87-1505

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

HARRY SHERMAN FLAVEL,

Petitioner,

v.

STATE OF OREGON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

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QUESTION PRESENTED

I. WHEN DOES THE ADMISSION OF POST-HYPNOTIC TESTIMONY IN A CRIMINAL TRIAL VIOLATE THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE AND THE SIXTH AMENDMENT RIGHT OF CONFRONTATION?

II. DOES THE OREGON SUPREME COURT EVIDENTIARY RULE EXCLUDING EXCULPATORY POLYGRAPH TESTIMONY VIOLATE PETITIONER'S RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE CONFRONTATION AND COMPULSORY PROCESS CLAUSES OF THE SIXTH AMENDMENT TO PRESENT A DEFENSE?

PARTIES

The interested parties are:

State of Oregon

Harry Sherman Flavel

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Petitioner, Harry Sherman Flavel, respectfully requests that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Oregon entered on April 8, 1987. On August 24, 1987, the Supreme Court of the State of Oregon denied Petitioner's Petition for Review. On December 2, 1987, that court denied Petitioner's Petition for Reconsideration.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

This Petition arises out of the defendant's September 3, 1985 conviction for First Degree Assault (ORS 163.185) in the Columbia County, Oregon Circuit Court. A Motion for a New Trial was denied on October 2, 1985. The Oregon Court of Appeals affirmed the defendant's conviction on April 8, 1987 without opinion. A Petition for Review to the Oregon Supreme Court was denied on August

24, 1987. The Petition for Reconsideration was denied on December 2, 1987.

This Court has jurisdiction under 28 U.S.C. § 1257(3) and Rules 17.1(b) and (c) of this Court.

The defendant is released pending appeal.

CONSTITUTIONAL PROVISIONS

United States Constitution Amendment V

United States Constitution Amendment VI

United States Constitution Amendment XIV

STATEMENT OF THE CASE

Harry Sherman Flavel was charged with Assault in the First Degree and Attempted Murder following an altercation with one Alec Josephson. He entered not guilty pleas on April 29, 1983. On July 1, 1983, the trial court granted Mr. Flavel's Motion for Admission of Polygraph Evidence. The State sought, and the

Supreme Court of Oregon issued, a preemptory writ to the trial court reversing that ruling. See State ex rel Gerttula v. Hunnicutt, 297 Or. 448, 687 P.2d 777 (1984). As a result, favorable polygraph evidence was excluded from Mr. Flavel's trial, which began on April 16, 1985. At its conclusion, Mr. Flavel was found guilty of Assault and not guilty of Attempted Murder. Judgment of conviction was entered on September 3, 1985. Defendant's Motion for New Trial, premised on the post-trial discovery that Mr. Josephson had undergone pre-trial "hypnotherapy," was denied on October 2, 1985.

The defendant was sentenced to the legal and physical custody of the Corrections Division of the State of Oregon for a period not to exceed 20 years. The trial court stayed execution

of the sentence and placed the defendant on probation for five years subject to a number of conditions, including service of one year in the county jail (stayed pending appeal) and payment of $26,107.85 as restitution.

STATEMENT OF THE FACTS

The charges against then fifty-five year old Harry Flavel arose out of an altercation with one Alec Josephson which ended with Mr. Flavel stabbing Mr. Josephson with a pocket knife. Mr. Flavel and Mr. Josephson were the only witnesses to their dispute. At trial, Mr. Flavel conceded he stabbed Mr. Josephson, but maintained he had acted in self-defense after the 22 year-old Mr. Josephson, and a man 33 years his junior, had repeatedly slammed him into a concrete wall and threatened to kill him. Mr. Josephson denied being the aggressor and claimed

that Mr. Flavel stabbed him after he merely grabbed Mr. Flavel's arm. The trial judge described the issue facing the jury as follows:

> "There were two eye-witnesses to the stabbing; the victim, Josephson, and the defendant, Flavel. As to who the aggressor was, the two gave conflicting testimony. There was really no corroboration of the testimony given by the two above as to who was the aggressor. (From my perspective, the case boiled down to the credibility of the victim and the defendant. The guilty verdict indicates to me that the jury chose to believe the victim's version of the event.)" September 18, 1985 Letter of Opinion Denying Defendant's Motion for a New Trial.

Shortly after charges against Mr. Flavel were filed he submitted to a polygraph examination conducted by a state-licensed polygrapher. Mr. Flavel was tested on whether: (1) Mr. Josephson threatened to kill him; (2) Mr. Josephson threw him against a wall; and (3) whether

he believed Mr. Josephson might kill him. The examiner found Mr. Flavel's physiological responses to questions (1) and (3) consistent with those of a truthful person. Responses to the second question were deemed "inconclusive." Mr. Flavel announced pretrial his intention to call the polygrapher as a defense witness. The trial court granted this request. The state obtained pre-trial review of his decision from the Oregon Supreme Court. That court held polygraph evidence inadmissible. The court acknowledged that the polygraph had achieved sufficient reliability and stature so as to "possess some probative value . . . [and] . . . be helpful to the trier of fact." The court nonetheless declared such evidence inadmissible because "the trier of fact may be overly impressed or prejudiced by a perhaps misplaced aura of reliability or

validity of the evidence, thereby leading the trier of fact to abdicate its role of critical assessment." See State v. Brown, 297 Or. 404, 438-39, 687 P.2d 751 (1984); State ex rel Gerttula v. Hunnicutt, 297 Or. 448, 451, 687 P.2d 777 (1984).

The case then returned to the trial court, where it proceeded to trial. A jury, which was thus prevented from hearing the favorable polygraph evidence, found Mr. Flavel guilty of Assault.

At sentencing, the State submitted documents in support of a request for restitution which disclosed for the first time that Mr. Josephson had undergone post-event, pre-trial "hypnotherapy." This disclosure formed the basis of for a Motion for New Trial. During the hearing on that Motion, it was learned that Mr. Josephson had undergone eleven 1 1/2 hour "hypnotherapy" sessions conducted by a

family friend whose training consisted of a nine-month program in Mortuary Sciences, some community college classes and workshops, and personal observation. The sessions were unrecorded, the "counselor" made only cursory notes, and neither he nor Mr. Josephson recalled who said what during them. The "counselor" testified that his purpose was to help Mr. Josephson deal with "his feelings of guilt" about the alleged assault, his fear of the up-coming trial, and the physical pain he was experiencing.

Petitioner presented substantial evidence that post-hypnotic testimony is unreliable, especially when conducted by an ill-trained person in unrecorded conditions. Despite this showing, the trial court denied Mr. Flavel's New Trial Motion.

LEGAL ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

Certiorari should be granted to resolve the conflicts within the federal circuit courts and among the states regarding the admissibility of post-hypnotic testimony in criminal trials.[1] Some state and federal courts discount the risk such evidence poses to due process and confrontation and admit such testimony. Others hold such evidence admissible if specific safeguards are utilized. These safeguards are both substantive (i.e., designed to minimize that chance of distorting memory) and procedural (i.e., designed to "make a record" of pre-hypnotic memory and the process itself to allow subsequent

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[1] This Court recently acknowledged that the admissibility of post-hypnotic testimony is an "unsettled" issue. In Rock v. Arkansas, 483 U.S. ____, 107 S.Ct. _____, 97 L.Ed.2d 37 at 51 (1987).

evaluation of compliance with substantive safeguards). Courts taking this view admit such evidence on the grounds that a fully-informed jury can effectively evaluate the weight to be given post-hypnotic testimony.

A third group of courts holds that hypnosis so distorts valid memory and the defendant's ability effectively to cross-examine that witnesses subjected to it may be excluded. These courts find distortion so fundamental as to violate due process and the right of confrontation.

These conflicting views create great disparity in the administration of justice. This Court should grant review to bring uniformity to the law.

Certiorari should also be granted because the Oregon Court's exclusion of exculpatory polygraph evidence violated the defendant's Fifth and Fourteenth

Amendment rights to present a defense and his Sixth Amendment right to compulsory process. Unlike hypnotically affected testimony, polygraph evidence has achieved scientific recognition as reliable. Because the Oregon court acknowledged that polygraph evidence possesses probative value and can be of help to the trier of fact, its per se rule excluding such evidence constitutes a denial of the right to defend oneself against criminal charges.

I.

WHEN DOES THE ADMISSION OF POST-HYPNOTIC TESTIMONY IN A CRIMINAL TRIAL VIOLATE THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE AND THE SIXTH AMENDMENT RIGHT OF CONFRONTATION?

A key function of the Due Process Clause is to protect the integrity of the truth-determining process. Stovall v. Denno, 388 U.S. 293, 298, 87 S.Ct. 1967,

18 L.Ed.2d 1199 (1967). In determining the constitutional admissibility of certain types of evidence, this Court has focused on whether certain evidence presents an unusual threat to that process. For example, "reliability is the linchpin" of whether identification testimony is admissible when preceded by suggestive out-of-court procedures. Manson v. Brathwaite, 432 U.S. 104, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Similarly, an involuntary confession is inadmissible for any purpose because of its inherent unreliability. Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed.2d 682 (1926).

Post-hypnotic testimony poses comparable dangers to the integrity of the trial process and the role of the jury. Indeed, the distortions associated with post-hypnotic testimony are more insidious

(and hence more threatening) than unreliable eyewitness testimony or coerced confessions. This has been recognized by many experts and courts.[2] For example, hypnosis renders a person highly "suggestible" and thus subject to altered perception or "memory" of an incident. This can occur from subtle and even unintentional verbal or nonverbal cues by the hypnotist and may materially distort the person's subsequent testimony. People v. Shirley, 31 Cal.3d 18, 181 Cal.Rptr. 243, 641 P.2d 775, cert. denied, 459 U.S. 860 (1982).

Hypnosis may also cause "confabulation:" the filling-in of details or gaps in memory. Such details may in fact be taken from an unrelated

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[2] See Rock v. Arkansas, 483 U.S. _____, 107 S.Ct. _____, 97 L.Ed.2d 37, at 51 (1987).

prior experience or even a fantasy. Not even experts can thereafter determine whether confabulation has occurred. Harker v. Maryland, 800 F.2d 437, 440 (4th Cir. 1986); State v. Hurd, 432 A.2d 86, 93 (N.J. 1981). Moreover, persistent distortions of reality occur during hypnosis. Because of the witness' suggestibility these distortions may be accepted without reflection. The witness emerges with a false or inaccurate memory which he accepts as reality. Little v. Armontrout, 819 F.2d 1425 (8th Cir. en banc, 1987); Diamond, "Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness", 68 Cal.L.Rev. 313, 333-34 (1980); Little v. Armontrout, supra.

Finally, hypnosis may cause "memory hardening:" an increase in the subject's certainty that post-hypnotic memory is

correct. Orne, "The Use of Hypnosis to Enhance Recall", 22 Science 1984 at 332 (1983); Bundy v. State, 471 So.2d 9, 17 (Fla. 1985).

For all these reasons, post-hypnotic testimony presents a major challenge to due process and the fundamental fairness of a trial and should be examined by this Court. Especially in a case such as Mr. Flavel's -- where none of the safeguards needed to minimize distortion were employed -- the threat to the validity of the process is so great as to rise to the level of constitutional deprivation. This is especially true because in his case he had no opportunity to cross-examine or confront the witness against him or to present evidence to the jury about the unreliability of post-hypnotic testimony. In this sense, a basic denial of due process has been exacerbated by a denial

of confrontation.

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is fundamental and made obligatory on the states by the Fourteenth Amendment. Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968). "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." Smith v. Illinois, 390 U.S. at 132. If the right to "effective cross-examination is denied, constitutional error exists without the need to show actual prejudice." Skinner v. Cardwell, 564 F.2d 1381, 1388 (9th Cir. 1977), cert. denied., 434 U.S. 1009, 98

S.Ct. 1883, 56 L.Ed.2d 392 (1978).

Unlike identification testimony or involuntary confessions, undisclosed pre-trial hypnosis renders a witness' trial testimony impervious to cross-examination and immune to effective impeachment. Not only the content, but the manner in which the witness presents himself or herself may be so altered as to present the jury with a totally misleading version of out-of-court events. If a witness sincerely believes that what he is relating is the truth, he becomes "both convincing and convinced". See State v. Mack, 292 N.W.2d 764 (1980). The importance of the right to trial by jury derives from the recognition that the jury is our most reliable means for critically determining "what really happened." The jury's ability to perform this most vital function is irretrievably compromised by

undisclosed hypnotically-affected testimony.

Virtually all courts apprised of the scientific evidence regarding hypnosis recognize the dangers inherent in post-hypnotic testimony. However, courts have differed markedly on whether and how these dangers affect admissibility. Some older opinions hold that such testimony is always admissible. Courts adopting this approach state that hypnosis affects weight, not admissibility. See, E.g., Harding v. State, 5 Md.App. 23, 246 A.2d 302 (1968), cert. denied, 395 U.S. 949, 89 S.Ct. 2030, 23 L.Ed.2d 468 (1969). A basic tenet of this approach is the belief that hypnotically enhanced recall is similar to ordinary recall. Thus, it is assumed that any inaccuracies in the recall testimony can be discovered and cured by skillful cross-examination, the

testimony of expert witnesses and the use of carefully drawn cautionary instructions. See, e.g., Chapman v. State, 638 P.2d 1280, 1282-84 (Wyo. 1982). This approach has been substantially undermined by more current research, the findings of which conflict with the earlier scientific authority upon which it relied. See e.g., Harding v. State, supra, overruled by Collins v. State, 52 Md.App. 186, 447 A.2d 1272 (1982), aff'd, 296 Md. 670, 464 A.2d 1028 (1983); People v. Hughes, 99 Misc.2d 863, 417 N.Y.S.2d 643 (1979); overruled by People v. Hughes, 88 A.D.2d 17, 452 N.Y.S.2d 929 (N.Y.App. Div. 1982); and State v. McQueen, 295 N.C. 96, 244 S.C.2d 414 (1978), overruled by State v. Peoples, 311 N.C. 515, 319 S.C.2d 177 (1984).

Other courts have adopted a middle ground which permits post-hypnotic

testimony if its proponent demonstrates the use of safeguards to minimize contamination and permit reconstruction of the hypnotic process itself. The leading case adopting this approach is State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981), in which the New Jersey Supreme Court established these preconditions to admissibility: (1) a qualified hypnotist must conduct the session; (2) that hypnotist must be independent of the parties; (3) all pre-hypnotic information given the hypnotist must be recorded; (4) a detailed description of the facts must be given by the subject prior to the hypnosis; (5) all contacts between the hypnotist and the subject must be recorded; and (6) only the hypnotist and the subject should be present. Comparable safeguards have been imposed by jurisdictions adopting this middle ground.

People v. Smrekar, 68 Il.App.3d 379, 24 Il.Dec. 707, 385 N.E.2d 848 (1979); State v. Iwakiri, 106 Id. 618, 682 P.2d 571 (1984); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (1981); State v. Armstrong, 110 Wis.2d 555, 329 N.W.2d 386, cert. denied, 461 U.S. 946, 103 S.Ct. 2125, 77 L.Ed.2d 1304 (1983); Little v. Armontrout, 819 F.2d 1425 (8th Cir. 1987).[3]

A third approach bars the use of post-hypnotic testimony. See State ex rel Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982) (Bank); People v. Shirley, 31 Cal.3d 18, 181 Cal.Rptr. 243, 641 P.2d 775, cert. denied 459 U.S. 860

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[3] Oregon adopted this approach by statute. The challenged testimony in this case would have been excluded had this statute applied. The trial court, however, refused to grant post-trial relief to Mr. Flavel, holding that this statute applied only when the state was aware pretrial of the witness' hypnotic experiences.

(1982); State v. Seager, 341 N.W.2d 420 (Iowa 1983); People v. Qui, 659 P.2d 710 (Colo.App. 1982); Collins v. State, 52 Md.App. 186, 447 A.2d 1272 (1982), aff'd, 296 Md. 670, 464 A.2d 104 (1983); State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984); Commonwealth v. Nazarovith, 496 Pa. 97, 436 A.2d 170 (1981). Courts that hold post-hypnotic testimony inadmissible do so because "inaccuracies the process introduces can be reduced, although perhaps not eliminated, by . . . procedural safeguards . . ." Rock v. Arkansas, 483 U.S. ____, 107 S.Ct. ____, 97 L.Ed.2d 37, 51-52 (1987). ["Safeguards do not guarantee the accuracy of the testimony because they cannot control the subject's own motivations or any tendency to confabulate, but they do provide a means of controlling overt suggestions." Ibid.].

While the per se exclusion of post-hypnotic testimony may be a drastic measure, it also may be the only method of assuring a fair trial. At the very least, the defendant's right to due process and confrontation requires a threshold of specific procedural safeguards similar to those adopted in State v. Hurd, supra. But regardless of whether a "safeguards" or "exclusion" approach is followed, Mr. Flavel is entitled to reversal and a new trial. The individual who hypnotized Mr. Josephson was essentially untrained. He was not independent. None of the pre-hypnotic information he possessed was recorded. He made no effort to record Mr. Josephson's pre-hypnotic memory. None of the sessions was recorded. Neither the witness nor the hypnotist could recall with any specificity what occurred during them.

Harry Flavel's trial involved a classic swearing match. There was no independent evidence showing how the incident escalated to a physical assault or who the aggressor was. The critical issue was credibility. Since Mr. Josephson's demeanor was seriously altered by his hypnotist's efforts to "help him find different ways to "perceive the incident" and relieve his "feelings of guilt", the jury was prevented from performing its constitutionally-mandated function.

Mr. Flavel is entitled to a new trial and, at a minimum, an opportunity to inform a jury that hypnosis distorted Mr. Josephson's testimony in both content and tone. On due process and confrontation grounds, therefore, this Court should grant review in this case.

II.

DOES THE OREGON SUPREME COURT EVIDENTIARY RULE EXCLUDING EXCULPATORY POLYGRAPH TESTIMONY VIOLATE PETITIONER'S RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE CONFRONTATION AND COMPULSORY PROCESS CLAUSES OF THE SIXTH AMENDMENT TO PRESENT A DEFENSE?

The criminally accused's right to compulsory process, that is, the right to have witnesses testify in his favor, is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. In Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) this Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own

> witnesses to establish a defense. This right is a fundamental element of due process.

Since Washington v. Texas, supra, this Court has recognized that an accused's rights to due process, confrontation and compulsory process create the right to present a defense. E.g., Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); Chambers v. Mississippi, 410 U.S. 284, at 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). This right supercedes otherwise valid rules of evidence. Thus, in Chambers, this Court held that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. This principle was reaffirmed last term in Rock v. Arkansas, supra, [invalidating

evidentiary rule which barred previously hypnotized defendant from testifying].

Like the evidentiary rules in Chambers and Rock, the per se exclusion of exculpatory polygraph evidence[4] denied Mr. Flavel due process. Both the trial court and the Supreme Court of Oregon concluded that the tendered polygraph testimony was reasonably reliable and probative of the issue of guilt or innocence. The latter nonetheless held such evidence inadmissible solely for fear that such evidence "may well divert the trier of fact from the direct and circumstantial evidence presented in a case to a

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[4] In State ex rel Gerttula v. Hunnicutt, 297 Or. 448, 687 P.2d 777 (1984) and its companion case State v. Brown, 297 Or. 404, 687 P.2d 751 (1984) the Supreme Court of Oregon ruled that polygraph evidence was inadmissible over the objection of a party. See also, State v. Lyon, 304 Or. 221, ____ P.2d ____ (1987).

distorted evaluation of the polygraph evidence." State v. Brown, 297 Or. at 440.[5]

This concern simply does not bear up under examination. Jurors routinely evaluate scientific evidence as complex as polygraph. The state may impeach such evidence through cross-examination or other witnesses. More significantly, the fear that an ignorant jury will unduly credit polygraph evidence and ignore conflicting evidence cannot justify infringing the defendant's due process right.

There were no other witnesses to Mr. Flavel's altercation with Mr. Josephson.

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[5] The Court also expressed concern that admission of such evidence would unduly delay trials. Such a concern, even if valid, clearly is insufficient to exclude such evidence. Administrative convenience cannot outweigh the constitutional requirement that trials be fundamentally fair.

The only evidence available to corroborate Mr. Flavel's version of what happened was the polygraph information he sought to introduce. Mr. Flavel's physiological responses were consistent with those of a truthful person, exculpatory and therefore relevant.[6]

The balancing test applied in Rock v. Arkansas, supra and Chambers v. Mississippi, supra at 302, precludes a per se exclusion of exculpatory polygraph evidence because of fears of juror awe and time consumption. Due process precludes interferance with the defendant's right to present evidence on such a prescriptive basis. This Court should grant Mr. Flavel's Petition to address the

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[6] That the complaining witness' testimony and demeanor were (unbeknownst to the defense) hypnotically altered rendered the polygraph evidence even more crucial.

admissibility of exculpatory polygraph evidence in the due and compulsory process contexts.

CONCLUSION

For each of the reasons stated above, this Court should grant this Petition for Writ of Certiorari, review and reverse the decisions of the Oregon Supreme Court and Oregon Court of Appeals and remand this case for a new trial.

DATED THIS 16 day of February, 1988.

Respectfully submitted,

RANSOM, BLACKMAN & SIMSON

/s/ MARC D. BLACKMAN

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APPENDIX

IN THE CIRCUIT COURT OF STATE OF OREGON
FOR THE COUNTY OF COLUMBIA

STATE OF OREGON	)	
	)	No. 30239
Plaintiff,	)	
	)	
v.	)	
	)	
HARRY SHERMAN FLAVEL,	)	
	)	
Defendant.	)	

LETTER OPINION OF SEPTEMBER 18, 1985

"The following is my opinion regarding the issue which is set forth below. The opinion should be made part of the order and incorporated therein by reference.

Issue. Does the fact that a State's witness was placed under hypnosis prior to trial and thereafter was allowed to testify without compliance with an apparently applicable statute (ORS 136.675) give rise to grounds for the granting of a motion for a new trial?

Facts. As a means of treatment for

overcoming the physical and psychological impact of the injury suffered by the victim, the victim, Alec Josephson, sought the assistance of a family acquaintance/mental health worker, Glen Yates. Mr. Yates, with a limited background in mental health care and some understanding of hypnosis accepted Josephson as a patient. Yates chose hypnotherapy as a means to aid Josephson in dealing with his psychological problems, which were caused by being stabbed, and his medical problems (nerve damage) which were also caused by the stabbing. Yates placed Josephson in a hypnotic trance on at least 10 occasions after the incident and before trial.

During these trances and prior to commencement of the treatment sessions some discussions of the stabbing incident were held. The exact amount of discussion

and the depth of discussion are unknown because neither Yates nor Josephson could recall. In addition, Yates made only cursory records of the sessions and they shed little if any light on the discussions. Neither tape nor video recordings of the sessions were made. The facts and circumstances of these hypnotic sessions were unknown to the defense or the prosecution at trial. Neither the defense nor the prosecution could be held to having constructive notice because neither of the parties had agents who knew of the sessions.

There were two eyewitnesses to the stabbing; the victim, Josephson, and the defendant, Flavel. AS to who the aggressor was the two gave conflicting testimony. There was really no corroboration of the testimony given by the two above as to who was the aggressor.

(From my perspective, the case boiled down to the credibility of the victim and defendant. The guilty verdict indicates to me that the jury chose to believe the victim's version of the event.)

Law. ORS 136.675 is the applicable statute.

1. If the State intends to offer the testimony of a person who has been hypnotized, and

2. If the hypnosis resulted in a state of trance, sleep, entire or partial unconsciousness, and

3. If the subject matter of the testimony to be given is a subject of discussion during the hypnosis trance, then

It shall be a condition of the use of such testimony that:

1. The entire procedure shall be electronically recorded either by audio

tape alone or a combination of audio/video tape, and

2. The recording shall be made available to the other party.

I am of the opinion that the statute need be read no further than the first provision. Reading the statute indicates that the State must know that a witness has been hypnotized before the conditions of the statute become operable. In this case that State had neither actual or constructive knowledge of the hypnotic session Josephson had undergone. Further, I am of the opinion that the defendant was afforded a fair trial by an impartial jury. I find no reason to grant defendant's motion for a new trial. The motions will be denied in their entirety. Mr. Faber may prepare the appropriate order.

..." Dated September 18, 1985.

IN THE CIRCUIT COURT OF STATE OF OREGON
FOR THE COUNTY OF COLUMBIA

STATE OF OREGON	)	
	)	No. 30239
Plaintiff,	)	
	)	
v.	)	
	)	ORDER DENYING
HARRY SHERMAN FLAVEL,	)	MOTIONS FOR
	)	NEW TRIAL
Defendant.	)	

"THIS MATTER having come before the court on the 17th day of September, 1985, upon defendant's Motions for New Trial; the State of Oregon appearing by Glenn Faber, Deputy District Attorney for Clatsop county, Oretgon; the defendant appearing in person and with his attorney, Des Connall; the Court having heard the testimony of witnesses and the arguments of counsel, and being fully advised in the premises,

IT IS HEREBY ORDERED that the Court makes the following Findings of Fact as stated in "Exhibit A", attached hereto and

by this reference incorporated herein.

IT IS FURTHER ORDERED that all Motions for a New Trial are denied in their entirety."

DATED this 2nd day of October, 1985.

IN THE CIRCUIT COURT OF STATE OF OREGON
FOR THE COUNTY OF COLUMBIA

STATE OF OREGON	)	
	)	No. 30239
Plaintiff,	)	
	)	
v.	)	JUDGMENT
	)	
HARRY SHERMAN FLAVEL,	)	
	)	
Defendant.	)	

The above-entitled case came on for sentencing on the 19th day of August, 1985, the State appearing by and through Glenn Faber, Deputy District Attorney for Clatsop County, Oregon, and the defendant appearing in person with his counsel, Des Connall. The Court, finding that more than forty-eight (48) hours has passed since the jury returned a verdict finding defendant guilty of Assualt of the First Degree, and being fully advised in the premises contained in the Presentence Investigation Report and the arguments of

counsel with respect to the issue of sentencing.

HEREBY ADJUDGES that defendant has been convicted of the offense of Assault in the First Degree;

AND FURTHER ADJUDGES, AND HEREBY ORDERS, that defendant be sentenced to the legal and physical custody of the Corrections Division of the State of Oregon for a period not to exceed twenty (20) years; that execution of said sentence be suspended; and that defendant be placed on probation to the Parole and Probation Department of the Corrections Division, of the State of Oregon/Clatsop County Corrections, for a period of five (5) years upon the following terms and conditions, to-wit:

1. That defendant remain under the supervision and control of the Probation Department.

2. That defendant abide by the direction of the Probation Department and its representatives.

3. That defendant promtply and truthfully answer all reasonable inquiries of the probation officer relating to probation performance.

4. That defendant truthfully report monthly at times and in a manner specified by the Probation Department or its representatives.

5. That defendant remain in the State of Oregon until written permission to leave is granted by the Probation Department or its representatives.

6. That defendant find and maintain gainful full-time employment, approved schooling, or a full-time combination of both, and that any waiver of this requirement must be based upon a finding by the court stating the reasons for the

waiver.

7. That defendant change neither employment or residence without promptly informing the Probation Department or its representatives.

8. That defendant permit the probation officer to visit the probationer or probation's residence or worksite.

9. That defendant submit to fingerprinting or photographing, or both, when requested by the Probation Department for supervision purposes.

10. That defendant obey all laws, municipal, county, state, and federal. (The Federal Gun Law of 1968 prohibits any person convicted of a crime punishable as a felony from using or possessing a firearm.)

11. That defendant pay fines, costs, including probation costs, attorney's fees or restitution or any combination thereof

as ordered by the court on a schedule of payments to be determined by the court.

AND FURTHER ADJUDGES AND HEREBY ORDERS that defendant's probation is subject to the following special conditions:

12. That defendant shall serve one (1) year in the Clatsop County Correctional Facility, less any and all time earned pursuant to "good time" and/or other sentence reduction provisions, and shall surrender on the 23rd of September, 1985, at 5:00 p.m.

13. That defendant shall pay a supervision fee in the sum of Ten ($10.00) Dollars per month as directed by his probation officer.

14. That defendant shall pay an assessment in the sum of Fifth ($50.00) Dollars to be credited to the Crime Victims' Assistance Fund, payable to the

Circuit Court Trial Court Clerk as directed by his probation officer.

15. That defendant shall pay restitution to Alec Josephson, 761 - 5th Street, Astoria, Oregon 97103, in the sume of Twenty-Six Thousand One Hundred Seven and 85/100 ($26,107.85) Dollars, payable to the Circuit Court Trial Court Clerk at the rate of Two Hundred ($200.00) per month beginning September 10, 1985, and with a balloon payment for the balance before defendant's probation expires.

16. That defendant shall have no contact whatsoever, either direct or indirect, with Alec Josephson or any member of his family.

AND HEREBY FURTHER ORDERS that defendant's present release status remain the same pending further order of the court.

The court reserves the right upon violation by defendant of any one of the conditions of probation or any reasonable requirements made by defendant's probation officer to revoke defendant's probation.

DATED this 3rd day of September, 1985.

/S/ John F. Hunnicutt
John F. Hunnicutt
Circuit Court Judge

IN THE COURT OF APPEALS OF
THE STATE OF OREGON

STATE OF OREGON,
Respondent,

v.

HARRY SHERMAN FLAVEL,
Appellant.

Court of Appeals Case No.: CA A37445

Trial Court Case No.: 30239(C)

Appeal from: Columbia County Judge: John F. Hunnicutt

Agency Case No.:

Judicial Review from:

Date Argued: March 18, 1987

Date submitted on briefs:

Before: Richardson, Presiding Judge, and Newman and Deits, Judges

Attorney for Appellant: Wayne mackeson

Attorney for Respondent: Virginia L. Linder/Jonathan H. Fussner

Affirmed without opinion.

Date filed: April 8, 1987

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON Respondent,	)	ORDER DENYING REVIEW
v.	)	
FLAVEL,HARRY SHERMAN Petitioner	)	CA A37445 SC S34088

The Court has considered the petition for review and ORDERS that it be denied.

DATE: August 24, 1987.

/S/ EDWIN J. PETERSON
EDWIN J. PETERSON
CHIEF JUSTICE

COPIES TO:

FUSSNER,JONATHAN H	Attorney for: Respondent
MACKESON,WAYNE	Attorney for: Petitioner

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,	)	
	)	ORDER DENYING
Respondent on Review	)	RECONSIDERATION
	)	
v.	)	
	)	CA A37445
HARRY SHERMAN FLAVEL,	)	SC S34088
	)	
Appellant on Review.	)	

The Court has considered the petition for reconsideration and ORDERS that it be denied.

DATED: December 2, 1987

/S/ Edwin J. Peterson
EDWIN J. PETERSON
CHIEF JUSTICE

copies: Marc D. Blackman
Wayne Mackeson
Jonathan H. Fussner

PETERSON, C.J. and LINDE, J. NOT PARTICIPATING

STATE OF OREGON, Respondent on review, v. ALVIN HAROLD BROWN, Petitioner on review.

No. C81-04-32024/A22491/S30146

Supreme Court of Oregon, In Banc

297 Ore. 404; 687 P.2d 751

July 10, 1984, Filed; Argued and submitted March 6, 1984

On review from the Court of Appeals.*
The Court of Appeals is affirmed.

* Appeal from Multnomah County Circuit Court, Richard L. Unis, Judge. 64 Or App 747, 669 P2d 1190 (1983).

JONES, J. wrote the opinion.

Marc C. Blackman, of Ransom, Blackman & Simson, Portland, argued the cause for petitioner on review. With him on the brief was Diane L. Alessi, Portland.

Stephen F. Peifer, Assistant Attorney General, Salem, argued the cause for respondent on review. With him on the brief were Dave Frohnmayer, Attorney General, and William F. Gary, Solicitor General, Salem.

JONES

JONES, J.

On April 3, 1981, the victim in this case was approached by a man whom she did

not know. After brief conversation, the man pulled her into the bushes and raped and sodomized her. The encounter lasted approximately 45 minutes. The next day, and again on April 8, the victim identified the defendant, Alvin Brown, as the perpetrator of the crimes by picking his photograph out of a photographic display.The defendant was then arrested and arraigned.

After retaining counsel, the defendant submitted to two polygraph examinations conducted by a private polygraph examiner, Kenneth Simmons, who specializes in criminal defense polygraphy. Simmons reported to defense counsel that his first polygraph examination os the defendant on April 13 produced inconclusive results. Simmons testified:

> "A. * * * [T]here were three relevant questions, two relevant questions, did you have sexual

> intercourse with [the victim] about April 3rd and did you have any sexual contact with [the victim] about April 3rd scored truthful.
>
> "The one question, the only question that went the other direction is did you force [the victim] to have sex with you about April 3rd.
>
> "Q. [by the prosecutor]: And, that scored to the deceptive side?
>
> "A. Right."

On April 21, this same examiner conducted what he called a "peak of tension" examination to determine if the defendant had knowledge of the events surrounding the reported rape.Examiner Simmons concluded that the defendant did not know about the specific details of the crime. The examiner purported to have information that was not available to the defendant concerning a dog, that the rapist had told the victim that he was in the Navy, and that he was driving a red Datsun pickup. After "passing" the second

test by the criminal defense specialist, the defendant agreed to take a third polygraph test conducted by a police specialist. However, the defendant refused to stipulate to the admissibility of any results of the police-conducted test prior to submitting to that examination.

Officer Arthur Bell, polygraph examiner for the Portland Police Bureau, conducted the third polygraph examination with the defendant on May 6, 1981. Officer Bell noted that the defendant appeared nervous and admitted that he had worked all day and that the evening before he had smoked marijuana and consumed beer. The defendant was asked specific questions by the examiner which included whether he forced the victim into having sex on April 3, 1981. Polygraph examiner Bell, after finding the results of the test were

inconclusive, noted that there was a great lacking in the degree of responsiveness shown in the tracings, stating:

> "* * * [T]he result on scoring is a very low total, and an evaluation score which does not reach criterion levels necessary for a conclusive call regarding truthfulness. It is my opinion that there is more evidence of truthfulness demonstrated in this examination than otherwise, but due to any number of factors present during this examination; including lack of rest, use of drugs, alcohol, repeated testing [this is his third on the same issue], personality * * * he does not seem to be very sensitive in any particular part of the exam series."

Prior to trial, the state moved to exclude any reference by the defendant or the state to any and all polygraph examinations taken by the defendant. Following a prolonged hearing, during which three experts testified regarding the polygraph in general and defendant's examinations, the trial court ruled the

evidence inadmissible. The defendant was convicted of rape in the first degree and sodomy in the first degree and appealed the convictions to the Court of Appeals which held that, in the absence of a stipulation, polygraph examinations are not admissible, citing State v. Green, 271 Or 153, 531 P2d 245 (1975), and State v. Bodenschatz, 62 Or App 606, 662 P2d 1, rev den 295 Or 446 (1983). We allowed review to address the defendant's contention that "[t]he defendant should have been allowed to introduce evidence regarding his submission to and truthful completion of polygraph examination."

THE ADMISSIBILITY OF SCIENTIFIC EVIDENCE

The term "scientific" as we use it in this opinion refers to evidence that draws its convincing force from some principle of science, mathematics and the like. Typically, but not necessarily, scientific

evidence is presented by an expert witness who can explain data or test results and, if necessary, explain the scientific principles which are said to give the evidence its reliability or accuracy. See Lilly, An Introduction to the Law of Evidence 400 (1978).n1

n1 How courts decide what scientific evidence is to be chosen for special treatment has never been precisely stated. So far as it can be dated, the notion of a special rule of admissibility for scientific evidence seems to have arisen in the 1923 case of Frye v. United States, 293 F 1013 (DC Cir 1923), to be discussed in this opinion. McCormick, Evidence 490-91 (2nd ed 1972).

Prior to the enactment of the Federal Rules of Evidence in 1975 (and prior to the enactment of the Oregon Evidence Code in 1982), most federal and state courts

facing the problem of the admissibility of scientific evidence relied on a test having its genesis in Frye v. United States, 293 F 1013 (DC Cir 1923). The Frye test, as it has become known, provides that before a court may admit scientific evidence the scientific principle"must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Id. at 1014. In this opinion we review the extensive history of the Frye test, evaluate alternative tests adopted by our Court of Appeals and other states, and abandon these special tests in favor of resolving the problems of admissibility of scientific evidence by relying on traditional evidence law as codified in the Oregon Evidence Code.

The door was left open by the Oregon Legislature and the writers of the Oregon

Evidence Code for this court to adopt a new approach to the admissibility of scientific evidence. The commentary to OEC 702 states:

> "The Legislative Assembly leaves for judicial decision the standard to be used in determining the admissibility of novel scientific evidence. * * *"

In response, we adopt traditional admissibility standards for expert testimony as set forth in our Oregon Evidence Code.

Justice Mark McCormick of the Supreme Court of Iowa, in his thesis Scientific Evidence: Defining a New Approach to Admissibility, 67 Iowa L Rev 879, 880 (1982), contends:

> "Four principal benefits can be achieved by abrogating special rules governing admissibility of scientific evidence and substituting traditional analysis. First, the admissibility judgment keeps judicial attention riveted on

> concepts judges are trained to employ. Second, the admissibility decision can be readily adapted to the characteristics of the evidence and the circumstances in which it is offered. Third, the traditional inquiry sharpens analysis without the distractions and collateral issues that can arise with special rules. Fourth, the single approach for all evidentiary issues fosters procedural simplicity and uniformity. * * *"

Under the traditional approach, expert testimony is subject to two main constraints. First, expert testimony must be relevant under OEC 401:

> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Second, expert testimony must provide some assistance to the trier of fact under OEC 702:

> "If scientific, technical or

> other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion of otherwise."

Under the Oregon Evidence Code and traditional evidence law, expert testimony is admissible if it is relevant under OEC 401 and will help the trier of fact in deciding a disputed issue. To be helpful, the subject of the testimony must be within the expert's field, the witness must be qualified, and the foundation for the opinion must intelligibly relate the testimony to the facts. If these conditions are satisfied, the testimony will be excluded only if it is unduly prejudicial, repetitive, or falls under some other exclusionary provision as provided in OEC 403:

"Although relevant, evidence

> may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."

In applying OEC 401, 702 and 403, this court must identify and evaluate the probative value of the evidence, consider how it might impair rather than help the factfinder, and decide whether truthfinding is better served by exclusion or admission. This case and the case of State ex rel Gerttula v. Hunnicutt, Or , P2d (decided this date), present questions which do not turn on the facts of the specific case and are not settled by the trial court's decision. See M. McCormick, supra, 67 Iowa L Rev at 882. This court, although informed by the trial record and assisted by the trial court's determination, accepts the

legislature's invitation as expressed in the quoted commentary and lays down a general rule that unstipulated polygraph evidence is inadmissible under any provision of the Oregon Evidence Code.

STANDARDS USED TO DETERMINE THE ADMISSIBILITY OF SCIENTIFIC EVIDENCE A. REASONABLY RELIABLE TEST: Kersting

When the issue of admissibility of the polygraph evidence was presented to the trial court in this case, counsel and the trial judge discussed at some length the effect the "reasonably reliable" test adopted by the Court of Appeals in State v. Kersting, 50 Or App 461, 623 P2d 1095 (1981), aff'd on other grounds 292 Or 350, 638 P2d 1145 (1982), might have in determining the admissibility of expert testimony concerning polygraph results. The Court of Appeals defined the test as follows:

"* * * [T]he only foundation

> required where the technique has not been accepted in this state is that there be credible evidence on which the trial judge may make the initial determination that the technique is reasonably reliable. If so, then the evidence may be admitted and the weight to be given it is for the jury, who may consider the evidence as to its reliability." (Emphasis added.) 50 Or App at 471.

Kersting involved the admissibility of expert testimony evaluating the novel scientific technique of microscopic hair analysis, not the admissibility of polygraph results.

We allowed review in Kersting to consider whether the Court of Appeals erred in adopting the "reasonably reliable" test, but found that we could not reach the issue because the challenged evidence was not opinion testimony of experts, but "testimony of mere observations, albeit observations aided by devices." 292 Or at 354. Therefore, this

court has not passed on the "reasonably reliable" test formulated by the Court of Appeals.

B. THE GENERAL ACCEPTANCE TEST: Frye

In Kersting, the Court of Appeals noted that the case of Frye v. United States, 293 F 1013 (DC Cir 1923), formed the genesis of the rule requiring that prior to the admission of expert testimony based on the application of a scientific technique, a foundation must be laid that the technique has obtained general acceptance within the relevant scientific community. Frye involved a defendant's attempt to introduce evidence of a rudimentary polygraph test which indicated his innocence. The Court of Appeals noted that a minority of courts had rejected the Frye approach as unnecessarily restrictive to the admissibility of otherwise scientific evidence. The Court of Appeals

acknowledged that this court has relied on Frye in excluding the results of polygraph examinations and quoted this court's statement from State v. Green, supra, 271 Or at 165-66:

> "'[t]he principal reason for rejecting such evidence is that the polygraph has not yet attained general scientific acceptance as a reliable and accurate means of ascertaining truth or deception, as required as a prerequisite to judicial acceptance of new scientific techniques and devices. [Footnotes omitted.]'" As quoted in State v. Kersting, supra, 50 Or App at 470.

In 1956, the Ninth Circuit adopted the Frye standard in Lindsey v. United States, 237 F2d 893 (9th Cir 1956), and it has consistently applied it in polygraph cases.

In United States v. DeBetham, 470 F2d 1367 (9th Cir 1972), cert den 412 US 903 (1973), the defendant sought to introduce exculpatory polygraph evidence. During a

four-day preliminary hearing, the defendant presented "volume after volume of testimony" by experts from the fields of polygraphy, psychology, psychiatry and physiology, all vigorously supporting the accuracy of polygraph evidence. Relying on Frye, the court concluded that despite a strong showing made by the defendant, "we are not ready to say that the trial judge abused his discretion in rejecting the offer." 470 F2d at 1368.

Some observers believe the general acceptance test of Frye should not be left to the trial judge's discretion.Commenting on United States v. DeBetham, supra, Professor Ronald S. Mathias recently stated:

> "Because the court cited Frye in support of its decision, its invocation of the 'abuse of discretion' standard can only be regarded as an unfortunate contradiction--one frequently committed by other courts and to

> be repeated by the Ninth Circuit. Reviewing a trial judge's discretion to admit novel scientific evidence only for abuse of discretion, thereby requiring no particular level of scientific acceptance, effectively ignores Frye. Determining admissibility by such a standard is indistinguishable from the mere 'relevancy' approach, an approach advanced by some as an alternative to Frye." Mathias, The Admissibility of Novel Scientific Evidence in the Ninth Circuit, 19 Willamette L Rev 533, 538-39 (1983). n2

n2 Professor Mathias concluded that the Frye standard represents the best reasoned, if somewhat cautious, approach to determine the admissibility of novel scientific evidence.

The Maryland Supreme Court in Reed v. State, 283 Md 374, 381, 391 A2d 364, 367 (1978), avoided leaving any discretion to the trial court in passing on the admissibility of scientific evidence when it said:

> "The question of the reliability of a scientific technique or process is unlike the question, for example, of the helpfulness of particular expert testimony to the trier or facts in a specific case. The answer to the question about the reliability of a scientific technique or process does not vary according to the circumstances of each case. It is, therefore, inappropriate to view this threshold question of reliability as a matter within each trial judge's individual discretion. Instead, considerations of uniformity and consistency of decision-making require that a legal standard or test be articulated by which the reliability of a process may be established."

In a 1983 Symposium on Science and the Rules of Evidence sponsored by the National Conference of Lawyers and Scientists, Paul C. Gianelli, Professor of Law, Commented in defense of the Frye test:

> "* * * The principal justification for the general acceptance standard is that it screens out unreliable scientific evidence. In United

States v. Addison, [498 F.2d 741 (D.C.Cir. 1974)], the D.C. Circuit wrote: 'The requirement of general acceptance in the scientific community assures that those most qualified to assess the general validity of a scientific method will have the determinative voice.' [Id. at 743-44.] Similarly, the Michigan Supreme Court has written: 'It therefore is best to adhere to a standard (Frye) which in effect permits the experts who know most about a procedure to experiment and to study it. In effect, they form a kind of technical jury, which must first pass on the scientific status of a procedure before the lay jury utilizes it in making its findings of fact.' [People v. Barbara, 400 Mich. 352, 405, 255 N.W.2d 171, 194 (1977) (admissibility of polygraph evidence)].

"In addition to reliability, the courts have identified several other supporting rationales for the general acceptance test. The Addison court wrote that the Frye test also guarantees that 'a minimal reserve of experts exists who can critically examine the validity of a scientific determination in a particular case.' [498 F.2d at 744.] In addition, the California Supreme Court has noted that the Frye

> test 'may well promote a degree of uniformity of decision. Individual judges whose particular conclusions may differ regarding the reliability of particular scientific evidence may discover substantial agreement and consensus in the scientific community.' [People v. Kelly, 17 Cal.3d 24, 31, 549 P.2d 1240, 1244-45, 130 Cal.Rptr. 144, 148-49 (1976).] Finally, the Maryland Supreme Court has commented that '[w]ithoug the Frye test or something similar, the reliability of an experimental scientific technique is likely to become a central issue in each trial in which it is introduced, as long as there remains serious disagreement in the scientific community over its reliability. Again and again, the examination and cross-examination of expert witnesses will be . . . protracted and time-consuming . . . and proceedings may well degenerate into trials of the technique itself.' [Reed v. State, 238 Md. 374, 388, 391 A.2d 364, 371-72 (1978).]" (Text of footnotes in brackets.) Symposium on Science and Rules of Evidence, 99 FRD 187, 191 (1983).

Professor Gianelli then noted criticisms of the Frye test by stating:

"Notwithstanding its wide spread judicial adoption, the general acceptance test remains controversial. A number of courts have rejected it and commentators have labeled it 'archaic,'34 'a sport,'35 'infamous,'36 and 'antiquated on the day of its pronouncement.'37 These critics, however, have not escaped unchallenged. One defender of Frye has written that the 'condemnations of Frye have been of the scattershot variety, hitting anywhere and everywhere, in a frenzied effort to cripple it.'38

"The criticisms of Frye have focused on a number of different issues * * *. One recurring point is that the heavy burden demanded by the Frye test deprives courts of relevant evidence. One judge has written: 'Society need not tolerate homicide until there develops a body of medical literature about some particular lethal agent.'39 As would be expected, courts favoring the Frye test disagree. According to the California Supreme Court, '[t]he primary advantage . . . of the Frye test lies in its essentially conservative nature.'40

"A second major criticism of Frye focuses on the difficulties of applying the general

acceptance standard.According to the critics, the standard is 'remarkably vague,'41 'undefinable,'42 and 'not enlightening.'43 * * *."
"* * *

"Third, even after the proper field has been identified, determining what constitutes 'general acceptance' in that field remains an issue. Dean Strong wrote that the 'resulting standard, something greater than acceptance by the expert himself but less than by all experts in the field, is obviously somewhat lacking in definiteness.'48

"Fourth, it is not clear whether Frye requires general acceptance of the underlying scientific theory or general acceptance of the technique applying that theory. This issue was raised by the National Academy of Sciences in its report on voice identification: 'The language of Frye seems to require acceptance of the underlying theory and not just of the technique itself.'49 * * *."

"34. Moenssens, Polygraph Test Results Meet Standards for Admissibility as Evidence, in Legal Admissibility of the Polygraph, 14, 19 (N. Ansley ed. 1975).

"35. 22 C. Wright & K. Graham, Federal Practice and Procedure 87 (1978).

"36. Tarlow, Admissibility

of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System, 26 Hastings L.J. 917, 923 (1975).

"37. Conrad, Landmarks and Hallmarks in Scientific Evidence in Sourcebook in Criminalistics, 37, 38 (C. Hormachea ed. 1974).

"38. Starrs, "A Still-Life Watercolor": Frye v. United States, 27 J. Forensic Sci. 684, 685 (1982).

"39. Coppolino v. State, 223 So.2d 68, 75 (Fla. App. 1968) (concurring opinion), appeal dismissed, 234 So.2d 120 (Fla. 1969), cert. denied, 399 US 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970).

"40. People v. Kelly, 17 Cal.3d 24, 31, 549 P.2d 1240, 1245, 130 Cal. Rptr. 144, 149 (1976).

"41. 22 C. Wright & K. Graham, supra note 35, at 87.

"42. Strong, Questions Affecting the Admissibility of Scientific Evidence, 1970 U. Ill. L.F. 1, 14.

"43. C. McCormick, Evidence 490 (2d ed. 1972).

"* * *

"48. Strong, supra note 42, at 11.

"49. National Academy of Sciences, On the Theory and Practice of Voice Identification 41 (1979. [NAS Report]" Id. at 191-93.

Professor Gianelli concluded his defense of Frye by observing that if courts are going to make mistakes in assessing the validity of a scientific technique, they should err on the side of excluding reliable evidence rather than on the side of admitting unreliable evidence. Id. at 207.

C. THE RELEVANCY TEST

The principal alternative approach to the Frye test is to treat scientific evidence in the same way that other evidence is treated, weighing its probative value against countervailing dangers and considerations. Professor McCormick advocated this position in his 1972 text:

> "* * * 'General scientific acceptance' is a proper condition upon the court's taking judicial notice of scientific facts, but not a criterion for the admissibility

of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, its probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, unfair surprise and undue consumption of time. If the courts used this approach, instead of repeating a supposed requirement of 'general acceptance's not elsewhere imposed, they would arrive at a practical way of utilizing the results of scientific advances." (Footnote omitted.) C. McCormick, Evidence 491 (2d ed 1972). Professor Stephen Saltzburg commented at the 1983 Symposium on Science and Rules of Evidence:

"* * * Contentions that Frye should be replaced with a relevance analysis are calls for unnecessary reforms. Frye * * * is consistent with the approach that common law courts have traditionally taken toward all evidence, an approach that is carried forward in modern evidence codifications such as the Federal Rules of Evidence. * * * [I]t is not very helpful to debate the question whether Frye or a relevance approach to scientific evidence is preferable. The two approaches are essentially the same,

> despite the frequency with which they are assumed to differ. The question that is more significant is how much success a scientific claim must have before courts will rely upon it. The answer to this question should be the same under Frye or a relevance approach." 99 FRD at 209.

The consensus of the distinguished participants n3 in that symposium was that courts should reject the Frye test because it is too conservative or ambiguous. Nevertheless, they found the relevancy test not satisfactory because it is too nebulous. In sum, these legal and scientific experts reached a consensus that the screening function of Frye should be retained but that the wording should be improved to promote clarity in the procedure and certainty in its effect. However, they were unable to draft or agree upon the wording of any new test.

n3 There were some 35 participants in

the 1983 Symposium including professors of law and of science, judges, legal and scientific administrators, and practicing scientists and attorneys, for example:

Professor Richard Bolt, Massachusetts Institute of Technology

Professor Margaret Berger, co-author Weinstein's Evidence

Professor Michael Graham, author Handbook on Federal Evidence

Professor Andre Moenssens

Justice Mark McCormick, Iowa Supreme Court

We generally agree with Professor McCormick's basic approach to the admission of scientific evidence. His approach does not focus on the Frye "general acceptance" test or the Kersting "reasonably reliable" test, but resolves the issue by applying traditional evidence

concepts. His theory is essentially a compilation of the standards for probity of OEC 401 and OEC 702 weighed against the possible prejudicial effect of evidence in OEC 403, set out supra 5-6.

However, we believe the "relevancy" test is strengthened by consideration of certain factors set forth by Professor Berger and Judge Jack Weinstein in their 1982 work on evidence. In determining whether scientific evidence is probative under OEC 401 and the relevancy and prejudice analysis implicated in OEC 702's helpfulness standard, we believe the seven factors set forth by those authors in 3 Weinstein's Evidence 702[03], pp 702-15 to 702-21 (1982), provide structure and guidance n4 in applying these rules of evidence. The salutary aspect of the Frye "general acceptance" test is retained, not as a prerequisite to admissibility, but as

one of seven steps in the screening process. Elements of the Kersting "reasonably reliable" test are filtered through all the factors. To determine the relevance or probative value of proffered scientific evidence under OEC 401 and OEC 702, the following seven factors are to be considered as guidelines:

(1) The technique's general acceptance in the field;

(2) The expert's qualifications and stature;

(3) The use which has been made of the technique;

(4) The potential rate of error;

(5) The existence of specialized literature;

(6) The novelty of the invention; and

(7) The extent to which the technique relies on the subjective interpretation of the expert.

The existence or nonexistence of these factors may all enter into the court's final decision on admissibility of the novel scientific evidence, but need not necessarily do so. n5 What is important is not lockstep affirmative findings as to each factor, but analysis of each factor by the court in reaching its decision on the probative value of the evidence n6 under OEC 401 and OEC 702.

n4 The evaluation of these factors will usually be done by the trial court in deciding the relevancy of proffered scientific evidence. However, because the admission of polygraph evidence raises an issue of law to be decided by this court, we evaluate these same factors at the appellate level.

n5 These are not the only factors which may be considered. Justice McCormick lists 11 factors in his article Scientific

Evidence: Defining a New Approach to Admissibility, 67 Iowa L Rev 879, 911-12 (1982):

(1) The potential error rate in using the technique;

(2) The existence and maintenance of standards governing its use;

(3) Presence of safeguards in the characteristics of the technique;

(4) Analogy to other scientific techniques whose results are admissible;

(5) The extent to which the technique has been accepted by scientists in the field involved;

(6) The nature and breadth of the inference adduced;

(7) The clarity and simplicity with which the technique can be described and its results explained;

(8) The extent to which the basic data are verifiable by the court and jury;

(9) The availability of other experts to test and evaluate the technique;

(10) The probative significance of the evidence in the circumstances of the case; and

(11) The care with which the technique was employed in the case.

n6 As we said in State v. Classen, 285 Or 221, 233, 590 P2d 1198 (1979), in referring to a set of standards to be applied in eyewitness identification cases:

> "* * * These are not to be taken as a mechanical checklist of 'constitutional' facts. Obviously other facts may also be important, such as the age and sensory acuity of the witness, or a special occupational concern with people's appearance or physical features, or the frequency of his or her contacts with individuals sharing the general characteristics of the person identified. Listing these and other relevant inquiries must not distract attention from the ultimate issue whether an

> identification made in a suggestive procedure has nevertheless been demonstrated to be reliable despite that suggestiveness. * * *" (Citations and footnote omitted.)

THE POLYGRAPH

Before we discuss these seven factors in reference to polygraph evidence, we set forth a brief description of the polygraph and polygraph technique.

Dr. Stanley Abrams, a Ph.D. in clinical psychology, testified in this case as to the theoretical basis of polygraphy as follows:

> "The best way to describe it is the polygraph clearly does not detect lies. What it does is measure various physiologic responses which are precipitated by emotional reactions. They might be mostly probably fear, fear of being caught in a lie, but it might also be conflict. It might also be simply an increase in emotional responsiveness. It operates off of the autonomic nervous system.
>
> "The autonomic nervous system innervates various viscera of

the body and controls their functions.It has two branches and you really have to understand this to understand the operation in general because the autonomic nervous system is divided between the parasympathetic and the sympathetic and the two of them operate in opposition to one another. So when one inhibits the function, the other does the opposite, it tends to enhance it.

"The parasympathetic system is dominant most of the time and is actually necessary for survival. It operates to enhance growth, repair of the tissues, digestion, things of that nature.But, any time that there is a threat to the organism, regardless what it is, the individual automatically shifts to the sympathetic nervous system which is basically an emergency system which allows the organism to utilize as much of the bodily resources as possible.

"So, for example, what happens is when one shifts over to the sympathetic dominance, the parasympathetic retracts and therefore it sends more blood and nourishment throughout the body. The pupils enlarge and increase the blood sugar and gives the person energy to deal with the threat, whatever the threat happens to be.

"The bronchial, the tubes of the lungs dilate so more oxygen can be taken in and the palms of the hands perspire so you can grasp things readily. Again it allows the individual to deal with * * * a fight or flight reaction so one can fight, run or climb to deal with this effectively. And, this occurs in any individual any time there is a threat.

"So that in a polygraph situation when a person is going to lie, he becomes fearful of being detected in that lie and this results in a shift over from the parasympathetic to the sympathetic dominance. And, all these changes take place which are recorded on the polygraph chart and then can be interpreted from that."

Dr. Abrams' testimony about the polygraph is not unique to this case. Further explanation of the polygraph technique has been described by Chief Judge Gibson of the Eighth Circuit in United States v. Alexander, 526 F2d 161, 163 (8th Cir 1975):

"The polygraph technique is based on the premise that an individual's conscious attempt to deceive engenders various involuntary physiological changes due to an acute reaction in the sympathetic parts of the autonomic nervous system. The polygraph machine is an electromechanical instrument

which measures and records these physiological fluctuations that are detected with the aid of three basic components: (1) the pneumograph which monitors the respiration rate of the examinee; (2) the cardiosphygmograph which gauges blood pressure and pulse rate; and (3) the galvanometer which measures the galvanic skin reflex or electrodermal response--skin resistance to electrical current (perspiration on the palmar surfaces of the hands will increase the flow of electrical current). Some of themore recent polygraph machines have incorporated a device that detects unobservable muscular activity believed to accompany intentional attempts to control the other responses that are recorded by the polygraph.

All of the physiological responses detected by these components are transmitted by a recording pen onto a constantly moving piece of graph paper, a polygram. The function of polygraph practitioners, or polygraphists, is to study and interpret the markings on the polygram and make a determination as to whether the recorded physiological reactions evince the psychological and emotional pressures which normally accompany intentional

> attempts to deceive. It is clear, therefore that the polygraph does not detect lies, but merely records physiological phenomena which are assumed to be related to conscious deception."

Prior to the examination, the examiner becomes informed about the facts of the case. The actual polygraph examination begins with a pre-test interview between the examiner and the subject. n1 During the pre-test interview, the examiner, with the help of the subject, constructs the wording of the questions that are to be asked during the examination. n8 Generally, three types of questions are used in polygraph examinations: relevant questions, irrelevant or neutral questions, and control questions. The relevant questions concern the subject's guilt or innocence of the crime charged. Irrelevant questions are used at the beginning and end of the test and relate

to neutral topics such as date of birth, name and age. Control questions serve as a basis of comparison with the relevant questions. Control questions are questions about acts of wrongdoing of the same kind as the incident under investigation, and the one to which the subject, in all probability, will lie or to which his answer will be of questionable validity in his own mind. See Reid & Inbau, Truth and Deception 28 (2nd 2d 1977). In addition to developing the questions for the examination, the pre-test interview is used by the examiner to gain the confidence of the subject, to motivate the latter to participate seriously in the examining procedure and to cause the subject to believe that the test will reveal a lie. The examiner does this by administering calibration and "stim" tests. n9

n7 See Reid and Inbau, Truth and Deception 11 (2nd ed 1977). We rely on numerous sources in this opinion which are essentially non-adjudicative. We take judicial notice of many legislative facts to decide whether the proffered evidence should be admitted. Taking judicial notice of legislative facts is not subject to the Oregon Evidence Code. However, the commentary to OEC 201(b) of the code reads in pertinent part:

> "* * * While judges take judicial notice of 'propositions of generalized knowledge' in a variety of situations--for example, when they determine the validity and meaning of statutes, or formulate common law rules, or decide whether evidence should be admitted, or assess the sufficiency and effect of evidence--these operations are all essentially nonadjudicative in nature. When judicial notice is seen as a significant vehicle for progress in the law, these are the areas involved, particularly in developing fields of specialized knowledge."

n8 Simmons testified about the pre-test interview:

> "* * * The pre-test has to be done correctly. The person has to be allowed to talk about the situation. You have to kind of get an idea of how emotional the person is in certain areas. Then, the questions have to be formulated right, the wrong questions can result in a bad test that obviously causes problems."

n9 D. T. Lykken, A Tremor in the Blood 94 (1981), provides an example of a "stim" test:

> "* * * The subject is asked to pick a number * * * from 1 to 7.That number is then recorded on a card or paper so that both the subject and examiner can see it. * * * [T]he subject is told to reply 'No' to each question of the form, 'Did you choose number X?' The subject is also told that the purpose of this procedure is to calibrate the polygraph, 'so that I can determine what your polygraph responses look like when you are lying and when you are telling the truth.' The ability of the procedure to inspire confidence in the subject depends upon this

latter statement. * * *"

After the pre-test interview, the actual examination takes place. The examiner asks all the previously prepared questions, both relevant and control. The physiological responses are recorded. The polygrapher repeats the process one or more times, changing the order of the questions. n10

n10 The relevant questions are never the first or last question asked, because the first and last questions elicit a greater response than the other questions.

After the examination, the examiner conducts a post-test interview. During this interview, the results of the polygraph test are discussed with the subject. If the results indicate deception, an attempt is made to determine if other factors could be responsible for the result. If other factors were

responsible, the questions are reworded and the test readministered. The subject is given the opportunity to compare his deceptive response on the "stim" test with the same response on the questions related to the crime under investigation. Abrams, A Polygraph Handbook for Attorneys 89-90 (1977).

1. The technique's general acceptance in the field.

There are several different types of polygraphic examinations, each based on different assumptions and each possessed of different degrees of accuracy. If the question is asked, "Should the results of polygraph examinations be admissible as evidence?," the response should not be an answer, but another question: "What type of polygraphic examination produced the results?" Dr. David Thoreson Lykken, a Professor of Psychology and Psychiatry at

the University of Minnesota Medical School, collects in his book, A Tremor in the Blood 149 (1981), the main types of polygraph examinations:

Relevant/Irrelevant (R/I)
(General Series Test)

Lie Control Test (LCT)

Zone of Comparison (ZOC)

Truth Control Test (TCT)

Positive Control Test (PCT)

Relevant Control Test (RCT)

Peak of Tension (POT)

Searching Peak of Tension Test (SPOT)

Lykken carefully evaluates each test in separate chapters in his book and then summarizes the tests by name, originator, subject of "control" questions and comments on validity as follows:

TABLE 12-1. The main types of polygraphic lie tests. Unless the test

conclusion is based solely on objective scoring of the polygraph charts, any of these methods degenerates to a clinical interview, its validity determined by the intuitive skills of the examiner. Typical "human lie detectors" seem to be wrong about 25% of the time.

Name of Test Originator Subject of Comment "Control" Questions

Relevant/Irrelevant(RI) (General Series Test) Larson Irrelevant, innocuous matters, The earliest method, yields many false-positives

Lie Control Test Reid Past misdeeds similar to but less serious than crime in question; answers assumed lies. Standard method for specific-issue work. Only method tested for validity; 64%-72% average, half of truthful subjects fail. Zone of Comparison (ZOC) Backster Same as LCT. Variant of LCT; similar assumptions, equivalent validity.

Truth Control Test (TCT) Reid Fictitious crime; subject led to think he is equally suspect, equally at risk Seldom used, never tested for validity. Requires elaborate deception of suspect.

Positive Control Test (PCT) Reali Subject required to answer each question with a lie, then truth; lie is the control

No validity data. Assumes that forced "lie" as arousing as real lie, forced truth equivalent to volunteered truth.

Relevant Control Test (RCT) (evolved) Only relevant questions; serve as controls for each other. Standard employee screening test. Widely used; no validity data.

Peak of Tension (POT) Keeler Like a multiple-choice item; incorrect alternatives are the controls. Only examiner and guilty subject know correct alternative. Several POT items yield a Guilty Knowledge Test. No validity data.

Searching Peak Test of Tension Test (SPOT) Keeler As above but examiner does not know correct alternative. Useful only if indications can be confirmed; a search procedure rather than a test.

Lykken is critical of all polygraph tests and results, he recognizes that the positive control test, the relevant control test and the peak of tension test are widely used and are generally accepted techniques in the field of polygraphy. The relevant control test and the peak of tension test were utilized in this case. As previously mentioned, polygraph experts

in this case found the relevant control test to be inconclusive. The defendant's central offer of proof was the result of the peak of tension test conducted by criminal defense polygraph examiner Simmons. The peak of tension test depends on the examiner having knowledge of details of the crime that the suspect should recognize only if he is guilty. In this case, specific information that reputedly was not made known to the defendant was communicated to the polygraph examiner. This information apparently was gleaned from the police reports by polygrapher Simmons. Simmons testified on direct examination:

> "* * * I used * * * the report that indicated [the] suspect had approached the victim and asked about a dog, made some mention about losing a poodle, that he couldn't find his poodle
>
> "So I asked him if he had any knowledge about what the girl

had been asked about at that time and he said he didn't. So I asked a series of questions, do you know if Nancy [the victim] was asked about a tavern, do you know if Nancy was asked about a dog, do you know if Nancy was asked about a street.

"I explained to him one of those items was what the victim was asked about. The others were just made up by myself. And, he answered no to all the questions he didn't know. So I went through that test as I recall three times asking those specific questions at different places.

"Q. Did you then evaluate the score on that or go on to another test?

"A. I went through another test.

"Q. What was the next test?

"A. The next series was related in that I asked him what type of dog was she asked about because the reports indicated the victim had been asked about a poodle. So I asked did you ask Nancy about a terrier, did you ask Nancy about a collie, did you ask Nancy about a poodle, about a shepherd, about a doberman. I asked about those five questions.

"Q. And, again you went through that series a number of times?

"A. That I went through two

times.

"Q. And, then the next series?

"A. The next series, the reports indicated that the suspect had told the victim that he was here on a Navy ship. He was in the Navy. I can't recall exactly the details on that, something about him being in the Navy. So I worked out a series of questions on that, did you tell Nancy you were in the Army, did you tell Nancy you were in the Navy, did you tell Nancy you were in the Air Force, did you tell Nancy you were in the Marines, did you tell Nancy you were in the Coast Guard, going now to all the questions.

"Q. And, how many times did you go through that series?

"A. I went through that twice.

"Q. And, did you go through the four series?

"A. Yes, four series, the suspect had told the victim that he was going to [meet] her the next day in a certain type of vehicle. He told the victim that he had two vehicles, one of the vehicles he said was a red Datsun pick-up. So I asked him a series of questions, did you tell Nancy he had a blue Volkswagen, green Camaro, black Firebird, did you tell Nancy you had a red [Datsun] pick-up, did you tel Nancy you had an orange

van.

"And, I again went through that twice.

"Q. I understand you instructed him to answer no each time?

"A. I told him if he didn't know the answer he didn't know what the actual item was, to answer no to each of the questions.

"Q.Then, after you got your tracings, tell us what you did?

"A. Then, I went through to look at the responses to all the different tests to see if there was any response that stood out on any specific item in the test.

"As it turned out there were no specific responses to key items, to the items that were taken from the police reports.

"Q. Now, is that a pattern of response that is consistent with the absence of knowledge?

"A. Yes.

"Q. And, in your experience the test is reliable to the ninety-fifth percentile?

"A. That's again an estimate. I would say it's a fair estimate."

Reid and Inbau, in their book, Truth and Deception (2nd ed 1977), claim the peak of tension test persists as a reliable indicator of deception even after an intensive interrogation or after a full complement of control question

> tests. Therefore, they teach that it is advisable whenever circumstances permit to administer a peak of tension test even though the number of tests conducted at any one sitting may amount to more than five or six. Id. at 55.

So far as we can determine, the peak of tension test is taught in every modern school of polygraphy. n11

n11 The peak of tension test was invented by Leonarde Keeler. Keeler's studies in polygraphy started in the 1920's when he was a high school student and had no professional psychological or scientific training. Nevertheless, he developed a portable polygraph instrument and joined the staff of the Scientific Crime Deduction Laboratory of the Northwestern School of Law in Chicago. Keeler has developed his own school of polygraphy.We will discuss the reliability and validity of the peak of tension test

in our discussion of factor No. 4, the potential rate of error.

2. Qualification of experts.

Polygraphers must be licensed by the State of Oregon and Oregon statutes regulate their qualifications. ORS 703.010 to 703.990 regulate all "persons who purport to be able to deduct deceptions and to verify the truth of statements through the use of instruments and mechanical devices, including but not limited to lie detectors, polygraphs and deceptographs."

ORS 703.090 provides that an applicant for a license as a general polygraph examiner must:

> "(a) Be at least 18 years of age;
> "(b) Be a citizen of the United States;
> "* * *
> "(e) Have received a baccalaureate degree from a college or university that is accredited by the American

> Association of Collegiate Registrars and Admissions Officers; or, in lieu thereof, be a graduate of an accredited high school and have at least five years of active investigative experience before the date of his application;
>
> "(f) Have graduated from a polygraph examiners course approved by the board and have satisfactorily completed at least 200 examinations, or have worked as a polygraph examiner for a period of five years for a governmental agency within the State of Oregon and have completed 200 examinations; and
>
> "(g) Have successfully completed an examination conducted by the board to determine his competency to act as a polygraph examiner."

ORS 703.060 describes the two types of polygraph examiner licenses: interns and generally licensed examiners. The public records of the Board on Police Standards and Training reveal that presently there are 16 interns and 35 licensed polygraphers in this state.

The fact that the State of Oregon requires basic qualifications for

examiners does not guarantee the examiners' expertise at the time of trial. Professor Inbau, a co-author of the polygraph text, Truth and Deception (2nd ed 1977), testified before a Congressional committee, that "only about 20 percent of the individuals who hold themselves out as examiners possess, in our opinion, the training and skill required for competency in the field." n12

n12 Inbau and Reid, The Lie-Detector Technique: A Reliable and Valuable Investigative Aid, 50 ABA J 470, 473 (1964).

In this case, Dr. Stanley Abrams testified. His qualifications are set out in the introduction to his book, A Polygraph Handbook for Attorneys (1977):

> "Stanley Abrams is a clinical psychologist in private practice and associated with the Permanente Clinic in Portland, Oregon. Polygraphy has been one

> of his areas of specialization and he has published a considerable number of papers in this area as well as several chapters in books. He has employed this procedure in a wide variety of criminal and civil cases and has testified for both prosecution and defense. His research findings have been presented before legal, psychological, and polygraph groups and he has served on various polygraph boards and has held office in the polygraph associations.
>
> "Dr. Abrams received the B.A. degree in psychology from Wilkes College in Pennsylvania and the M.A. and Ph.D. in clinical psychology from Temple University He completed an internship at Temple University Medical School in 1960 and in 1971 took a course in polygraph at the Gormac School in Los Angeles."

Polygrapher Simmons, who also testified for the defense, is licensed by the State of Oregon and is a member of the American Polygraphy Association and the Northwestern Polygraphy Examiners Association, has practiced polygraphy for

four years as an independent examiner doing mostly criminal defense work for private attorneys in criminal cases. He holds a Bachelor of Science degree in the Social Sciences from the Oregon College of Education and graduated from the Backster School of Lie Detection in San Diego, California, after some 250 hours of specialized polygraphy training. He has conducted hundreds of polygraph examinations and passed a written test for polygraph technique. The trial court would be fully justified in reaching the conclusion that both Dr. Abrams and polygrapher Simmons were well-qualified as experts in their field.

3. The use which has been made of the technique.

The New York Civil Liberties Union conducted a study on polygraphs and employment. In an article entitled

Polygraphs and Employment: The Myth of Lie Detection, NYCLU Privacy Project (June 1981), by Trudie Hayden, the author points out that up to 500,000 polygraph tests are administered nationally by employers as a pre-condition to employment. Although we do not know the numbers, it is common knowledge that police n13 and law enforcement agencies utilize polygraph examinations routinely in the investigation of criminal activity. Extensive use of polygraphy is not equivalent to general acceptance by the relevant scientific community as set forth in the Frye decision. Widespread use may have some bearing on probity, but is certainly not determinative.

n13 Federal government polygraph use has more than tripled over the last 10 years, with about 23,000 examinations conducted in 1982. Office of Technical

Information Report, Polygraph Magazine, Sept. 1983.

The public record of the Board on Police Standards and Training, see ORS 703.010, reveals that the Oregon State Police conducted 3,903 polygraph examinations from 1981 through 1983. This does not include tests conducted by city, county or federal law enforcement examiners.

4. Potential rate of error.

The accuracy of the polygraph has been the subject of numerous tests, set out infra at 32. Accuracy can be broken down into two categories: reliability and validity. The reliability of a test is the consistency with which the test measures whatever it is that it measures.For example, if 100 people were given polygraph examinations five times, and in each test the same 85 people were

found to be telling the truth, the test would be very reliable. The validity of the test is the extent to which the test measures that which it claims to measure. Using the same example from above, if only 30 of the 85 people who were found to be telling the truth actually were telling the truth, the test would not have a high degree of validity. A test can be very reliable but have a low degree of validity; on the other hand, a test that is unreliable cannot have a high degree of validity.

Determining the validity or reliability of polygraph examinations is difficult because the truth or falsity of the findings is rarely established subsequent to the examination. Dr. Abrams testified that in real life research the polygrapher does not have the opportunity to verify results in 40 percent of the cases.

Furthermore, as Reid and Inbau point out:

"A statistical determination of the accuracy of the Polygraph technique is practically impossible, just as it is in so many other fields involving the testing of human beings. For instance, the medical profession could hardly arrive at a statistically sound figure as to the accuracy of the diagnoses physicians make with respect to the physical ailments of patients. Not all of the mistakes of physicians are discovered, and there are many instances where the correctness of their diagnoses never becomes known to them. Yet we know that by and large their successes far outnumber their failures.

"In many case investigations involving the use of the Polygraph technique, the truth or falsity of the examiner's findings is never factually established by subsequent events or disclosures. Proof

is often lacking, therefore, as to whether the examiner in any given case was right or wrong. Nor can the accuracy of the Polygraph technique be determined in a psychology laboratory setting or by the use of fictitious crimes under other testing circumstances. This limitation prevails for the simple reason that it is practically impossible to simulate conditions comparable to those involved in actual case situations. The closest approach would be to have an examiner, or group of examiners, test a number of persons regarding an offense allegedly committed by one of them, without disclosing to the examiner the fact that all were innocent. But this would only determine accuracy with respect to innocent persons; it would not, and obviously could not, reveal anything whatsoever as regards accuracy in the

testing of guilty persons." Reid and Inbau, supra, 303-04.

As previously mentioned, the term "accuracy of polygraphy" is ambiguous because in addition to the problems listed by Reid and Inbau, the researchers do not distinguish which type of polygraph test is being evaluated nor do they distinguish between reliability and validity. For instance, the Police Polygraph Journal, 1980-81, reports a partial list of accuracy ratings of polygraph tests without reference to the type of test or the basis for the determination of accuracy:

SOURCE	ACCURACY OF POLYGRAPH
Barland, Gordon H. University of Utah	89.7%
Bersh, Philip J. Temple University Study for the U.S. Army	92.4%
Blum, Richard H. & Osterloh, William	96.2%

Stanford University

Edel, Eugene C. & Jacoby, Jacob Study for U.S. Government	95.0%
Horvath, Frank S. & Reid, John E.	87.8%
Lahri, S.K. & Gaunguly, A.K. Government of India	90.0%
Podlesny, John A. & Raskin, David C. University of Utah	94.0%
Raskin, David C. & Hare, Robert H. University of British Columbia	96.0%
Slowik, Stanley & Buckley, Joseph P.	87.2%
Wicklander, D. & Hunter, F.	92.5%
Widack, Jan & Horvath, Frank Jagolian University Poland	95.0%

Reid and Indau claim "[t]he percentage of known errors with the technique used in the laboratories of John E. Reid and Associates is less than one percent." Reid and Inbau, supra at 304.Arther also claims

99 percent accuracy in "The Scientific Investigator" (1965). The record in State ex rel Gerttula v. Hunnicutt, supra (decided this date), reveals that Dr. Stanley Abrams testified that "when you break down the studies, it comes to roughly 98 percent accuracy." n14 Recent objective evaluation studies, done by simply evaluating charts without the person tested present, demonstrate accuracy ranging from 67.0 percent to 90.9 percent, n15 depending on the experience of the polygrapher. n16

n14 However, Abrams is criticized by Lykken, supra n 10, for tabulating a dozen studies spanning 56 years, some using the now often discarded relevant/irrelevant test, lie control test studies based on as few as 11 cases or as many as 175, studies using subjective clinical evaluations and others using independent chart

evaluations, "and then Abrams simply averages the percent correct in each study."

n15 Hunter and Ash, The Accuracy and Consistency of Polygraph Examiners' Diagnoses, Vol 1, No. 3, J of Police Science and Administration 370 (1973).

n16 Abrams testified straight chart evaluation studies varied from 88 percent accuracy to a low of 63 percent.

In addition to the problems with the studies examining the accuracy of the polygraph, the accuracy of the polygraph test itself is questionable. Subjects employ physical and psychological evasion tactics in an effort to "beat" the polygraph.They alter breathing patterns by hyperventilating or taking heavy breaths when irrelevant questions are asked, flex, tense or contract muscles, bite on their tongue, and have been known to place a

tack in their shoe and press down on it each time a question is asked. Lykken, supra at 238-39.

Some subjects attempt to evade detection by transferring their "thought processes from the relevant to the irrelevant questions of from the matter under investigation to some other one of [their] offenses or wrongdoings of a similar nature." Reid and Inbau, supra at 210-11. In the case of a psychopathic liar, n17 the subject's deceptions are entirely conscious and deliberate. "Research has shown that the genuine psychopath is less bothered than the normal person is about danger in general and punishment in particular. He is relatively untroubled by impending unpleasantness, whether of his cwn making or not." Lykken, supra at 229-30. Because of their lack of response, psychopaths may

be better able than normal subjects to "beat" the polygraph.n18 There is little question but that there is a large population of psychopaths or, to use current terminology, persons with anti-social personalities, n19 involved in the criminal justice system. In contradistinction to the psychopathic liar, the extremely emotional and anxious truthful person runs the risk of registering a falsehood. n20

n17 Psychiatrist Hervey Cleckley described a psychopathic liar thusly:

> "The psychopath shows a remarkable disregard for truth and is to be trusted no more in his accounts of the past than in his promises for the future or his statement of present conditions. He gives the impression that he is incapable of ever attaining realistic comprehension of an attitude in other people which causes them to value truth and cherish truthfulness in themselves. Typically, he is at ease and unpretentious in making a

> serious promise or in (falsely) exculpating himself from accusations, whether grave or trivial. His simplest statement in such matters carries special powers of conviction. Overemphasis, obvious glibness, and other traditional signs of the clever liar do not usually show in his words or in his manner. Whether there is a reasonable chance for him to get away with the fraud or whether certain and easily foreseen detection is at hand, he is apparently unperturbed and does the same impressive job * * *. During the most solemn perjuries he has no difficulty at all in looking anyone tranquilly in the eyes." (Footnote omitted.) Cleckley, The Mask of Sanity 341 (5th ed 1976).

n18 Professor Robert Hare and Dr. Lykken conclude that this theory has yet to be disproven.Lykken, supra n 9 at 232-33.

n19 Diagnostic and Statistical Manual of Mental Disorders (Anti-social personality), DSM III, American Psychiatric Association (3rd ed 1981).

n20 Lykken, supra n 9 at 114, 126,

gives the following example:

> "* * * In Yakima County, Washington, where all women who report rape are required to take lie detector tests, 60% 'fail' the tests due to strong reactions to the relevant questions. n2

n2 "Lie Test for Rape Victims, Mother Jones, July 1979, p. 10. This practice is widespread in the U.S. Jan Leventer, codirector of the Women's Justice Center [WJC] in Detroit, determined in 1978 that rape victims were being subjected to polygraph tests in at least 17 states. The WJC brought suit to stop the practice in Detroit and, in January of 1979, the Detroit Police Department agreed to these demands. In Maryland, one of the 'relevant' questions routinely asked during lie tests of rape victims was, 'Did you have an orgasm?'"

The motivation of the subject also affects the accuracy of the polygraph

results.The subject's concern about the seriousness of the offense charged, his attitude regarding the fallibility of the polygraph and his state of mind if he knows adverse test results will not be used in court against him of if he knows he has previously "passed" a prior test, n21 may influence the physiological responses of the subject.

n21 A commentator has suggested it should be standard practice for the defense to obtain an "ex parte" polygraph examination before stipulating to the results of a polygraph examination:

"If defense counsel seeks to enter a stipulation for the introduction of polygraph evidence, it is incumbent upon him to pretest the client with a polygrapher of counsel's own choosing. Failing to do this may amount to incompetence because counsel is

necessarily ignorant of what the results of the test will be. Usually the issue upon which a test is given is dispositive of a case, and by stipulating to what may be the most crucial evidence against his client, defense counsel could be deemed to be withdrawing a crucial defense.To remedy this problem, a prestipulation private examination should be run on a defendant, and if the results are favorable, the stipulation may be entered with some degree of confidence that the results of the second test will not result in disaster." 43 ALR Red 68, 77 (1979).

Defense counsel can shop for a friendly polygraph examiner, hire that examiner as a "consultant" under the attorney-client privilege, see OEC 503 and Brink v. Multnomah County, 224 Or 507, 356 P2d 536 (1960), and if the defendant flunks that examination, the prosecution normally

never knows the results of the examination.Even if the prosecution knew of such an examination, the state could not offer any evidence or comment about the examination. On the other hand, if the defendant passes an ex parte polygraph examination, the defendant can take a subsequent examination genuinely believing that it cannot hurt him.

There are other factors n22 which potentially could affect the accuracy of the polygraph examination, including involvement in other similar acts or offenses, excessive interrogation prior to test, adrenal exhaustion, inadequate question phraseology, and physiological abnormalities due to the use of alcohol or other sedatives. n23 All of the above-listed evasive techniques may affect the accuracy of the polygraph. However, polygraphers may be able to compensate for

that impact because the evasive conduct is significant and may manifest itself on the tracings of the polygraph.

n22 See Reid and Inbau, Truth and Deception 194-257 (2nd ed 1977).

n23 In this case, defendant admitted that prior to the third polygraph he had smoked marijuana and consumed beer.

Although Dr. Abrams has testified that polygraph testing is 98 percent accurate, he cited no studies directed specifically to the peak of tension test to back up this estimate. Lykken contends there is no validity assessment of the peak of tension test. However, Dr. Stanley Abrams, in his treatise, A Polygraph Handbook for Attorneys 72 (1977), states: "Lykken in dealing with this [peak of tension] technique on a statistical basis indicated that with this approach the likelihood of determining guilty knowledge

is extremely high." D.T. Lykken, Psychology and the Lie Detector Industry, Amer. Pscyhologist 29 (1974).

An article in Polygraph magazine n24 reports that a witness from the Office of Technology Assessment for Congress testified that an "overall measure of validity [of polygraph examinations] is not possible." After an exhaustive review of the literature in the field, that governmental agency official concluded: "Central to legal, legislative and scientific assessments of polygraph tests are their validity.Yet, despite many decades of judicial, legislative and scientific discussion, no consensus has emerged about the accuracy of polygraph tests." Id. at 238.

n24 Polygraph monthly magazine (Sept 1983).

We conclude no judgment of polygraph

testing's validity or potential rate of error can be established based on available scientific evidence. The polygraph test is, in reality, a very complex process that involves much more than the instrument or the polygram. Although the instrument is essentially the same for all applications, the types of individuals tested, the training of the examiner, the purpose of the test, the type of test utilized, the questions asked, among many other factors, can differ substantially. In spite of all these variables in polygraph testing, the polygraph experts persist in telling the trier of fact, as they did in this case, that polygraph tests are virtually infallible. n25

n25 In saying this in respect to the admissibility of polygraph evidence in a court of law, we do not discount the

important role polygraphy plays as an investigative aid in criminal cases or otherwise.

5. The existence of specialized literature.

Over one thousand articles have been written on the subject of polygraphy. Much of the literature is written by polygraphers wishing to advance the technology in their chosen field. Reid, Inbau, Dr. Stanley Abrams and F. Lee Bailey are among those who lead the supporters, while Dr. David Lykken is a noted critic of polygraphy. In any event, there is no dearth of literature available on this controversial subject.Some of the articles are written by scientists, some by lawyers, some by law enforcement personnel, and some by polygraphers. The articles are pro and con with respect to the polygraph's use in society, its

validity and its admissibility in courts. The availability of this mass of literature may or may not be relevant in any given case.

6. The novelty of the invention.

Webster's Dictionary defines "novelty" as something "new or unusual." There is nothing especially "new" about the polygraph instrument, the polygram, or the various tests or existence of qualified examiners.The first attempt to utilize a scientific instrument in an effort to detect deception occurred about 1895. In that year, Cesare Lombroso used a blood pressure device for the purpose of detecting lies. He conducted some rudimentary experiments in the field of detecting deception. In 1915, William Moulton Marston, a lawyer and Ph.D. from Harvard University, developed a polygraph instrument which consisted essentially of

the instrument commonly used by physicians in determining a patient's blood pressure.He also recorded respiration and experimented with the galvanometer to record skin resistance changes. n26

n26 Dr. Lykken, supra n 9 at 27-28, is very critical of Marston:

"Marston not only invented modern lie detection but was among the first to appreciate its commercial possibilities.An article in Look Magazine described his use of the polygraph in marital counseling; a wife's reaction to her husband's kiss is compared with her response to the kiss of an attractive stranger. Marston and his machine appeared in full-page ads for razor blades. Finally hitting upon the ideal outlet for his fertile imagination, Marston--under the nom de plume 'Charles Moulton'--created the comic strip character Wonder Woman.

"Because of his extravagant claims and uninhibited conduct, Marston was repudiated by serious students of polygraphic interrogation. In a scathing review of his 1938 book, Professor Fred Inbau concluded, 'It can only bring ridicule upon the subject matter and disrespect for its author.' Nonetheless, Marston might be called the grandfather ('foxy grandpa?') of polygraphy because of the early reports of his work, published prior to 1921, and their impact on Chief August Vollmer of the Berkeley, California, police department and especially upon one of Vollmer's police officers, John A. Larson."

Reid and Inbau report that:

> "* * * [In 1921], John A. Larson * * * constructed an instrument capable of continuously recording all three phenomena--blood pressure, pulse, and respiration--during the entire period of the test.

With his instrument Larson conducted a number of tests on criminal suspects and reported a high percentage of accuracy in his results.

"In 1926 Leonarde Keeler constructed a more satisfactory instrument than the one used by Larson. Later on Keeler made additional changes in the instrument, and at the time of his death in 1949 the 'Keeler Polygraph' included, in addition to units for recording blood pressure-pulse and respiration changes, a galvanometer for recording what is known as the galvanic skin reflex or electrodermal response (generally referred to as the GSR).

"Keeler is also to be credited with introducing the card test (which he used for "control' purposes), and the specialized peak of tension test * * *.

"* * * Reid found that by various forms of unobservable muscular activity, a subject's blood pressure could be changed in such a manner as to affect seriously the accuracy of the examiner's diagnosis.He then devised an instrument (the 'Reid Polygraph') for recording muscular activity along with changes in blood pressure, pulse, respiration, and GSR.

"In 1947 Reid introduced a completely revised Polygraph

> technique, the most significant feature of which was the utilization of a 'control question.' It is the basic response indicator that is the core of what has become known as the 'Reid control question technique.' * * *" Reid and Inbau, supra at 3.

Other experts who became prominent in the field include Arther and Backster. Arther became the Director of the National Training Center for Polygraph Science in New York, and Backster founded the Backster School of Lie Detection in San Diego, California, which was attended by polygrapher Simmons. The Gormac Polygraphy School of Arcadia, California, which was attended by the other two polygraphers involved in this case, is another recognized school of polygraphy.

Marston's crude pioneering instrument has been replaced by sophisticated computerized instruments manufactured by such firms as Stoelting and Lafayette. Dr.

Abrams uses the Lafayette and, in this case, Simmons and Bell used the Stoelting. There is little difference in the instruments themselves. See Abrams, A Polygraph Handbook for Attorneys 54-60 (1977).

If polygraphy dates back some 90 years and the instruments are not novel, what causes polygraph evidence to be considered "novel scientific evidence"? The novelty of polygraphy arises because it is the only scientific evidence utilizing instrumentation that attempts to convey to a jury whether a witness has been deceptive or truthful. In that sense, polygraphy is truly novel and unique. With rare exceptions, for example, United States v. Ridling, 350 F Supp 90 (ED Mich 1972); United States v. Zeiger, 350 F Supp 685 (DC 1972); State v. Dorsey, 88 NM 184, 539 P2d 204 (1975); State v. Sims, 52 Ohio

Misc 31, 369 NE.2d 24 (CD 1977), state and federal courts in this country have rejected the admissibility of such evidence in our trial courts.

7. The extent to which the technique relies on the subjective interpretation of the expert.

The final factor which may be considered is the extent to which the technique relies on the subjective interpretation of the expert. Authorities agree that the accuracy of polygraph evidence depends upon the expertise of the examiner. n27

n27 See, Lykken, supra n 9 at 89-93; Reid and Inbau, supra n 22 at 304-05. Reid and Inbau state the following:

> "Basic to all that has been said with regard to the utility and accuracy of the Polygraph technique is the matter of examiner qualifications.
>
> "An examiner must be an intelligent person, with a

> reasonably good educational background--preferably a college degree. He should have an intense interest in the work itself, a good practical understanding of human nature, and suitable personality traits which may be evident from his otherwise general ability to 'get along' with people and to be well liked by his friends and associates. No amount of training or experience will overcome the lack of these necessary qualifications.
>
> "Many persons now functioning as Polygraph examiners do not possess these basic qualifications. They should never have been encouraged to embark upon such a career.
>
> * * *"

Reid places great importance on observing and noting a subject's behavior during the pre-test interview, the actual test and the post-test interview. In 1953, he and Arther developed a list of "behavior symptoms" which purportedly discriminated between lying and truthful subjects during a polygraph examination. According to this study, if the subject

appears nervous, resentful, aggressive, appears to be in a shocked condition, exhibits "mental blocks," has a dry mouth or a gurgling stomach, refuses eye contact, moves restlessly, appears "overly friendly or polite," describes himself as religious, complains of pain from the blood pressure cuff, being eager to finish the examination and leaves promptly--all these are behavior symptoms of the liar. However, if the subject appears confident, eager to undertake the examination, sincere and straightforward, the subject is exhibiting symptoms of truthfulness.n28

n28 Reid and Inbau conclude that if the polygraph records clearly indicate deception, they should be given preference over contrary behavior symptoms.Reid and Inbau, supra n 23 at 193.This study also includes a third list of "Behavior Common to both Liars and Truthtellers." Reid and

Inbau, supra n 23 at 294.

Polygraph test results may be altered by the examiner's preconceptions as to factual elements of the case or the guilt or innocence of the subject. If the examiner has an accusatory tone of voice, rather than a neutral tone when asking the questions, the subject's response may be altered. If the examiner is biased as to the subject's guilt or innocence, the questions may be framed differently. Furthermore, any preconceptions or biases are likely to influence the examiner's final interpretation of the polygraph charts. n29

n29 Dr. Martin T. Orne, one of the leading psychophysiologists doing polygraph research, testified in United States v. Urquidez, 356 F Supp 1363, 1365 (DC CD Cal 1973), as follows:

"* * * [T]he very charts

> themselves are likely to be affected by the believes of the polygraph man as he is testing them, so that I cannot believe that you test someone exactly the same way if you have a very high belief in his guilt than if you have a very high belief of his innocence * * *. [N]o one has ever separated the effects of the conviction of the polygrapher from the kind of charts he gets. There is good reason to believe that the physiology that people will show is going to be affected by the way they are tested."

The results of the test depend on the training and experience of the examiner. In addition to operating the polygraph mechanically, the examiner needs to know how to conduct a pre-test interview. The examiner must be able to frame appropriate questions, read and interpret the polygraph charts, detect indications of use of depressant drugs and analyze the subject's behavior symptoms. A study conducted by Horvath and Reid n30 to determine if polygraphers were able to

diagnose deception solely from analysis of polygraph records indicated that an inexperienced examiner (one with less than six months' experience) has the poorest consistency (79.1 percent) and the most experienced examiner had the best consistency (91.4 percent) of all examiners in the study.

n30 The study was designed to determine if professional polygraphers were accurate and consistent in their judgments of real-life cases of known truth and deception responses. The examiners were forced to base their opinions on the polygraph charts alone. The test results showed an average accuracy of 87.75 percent in correctly identifying the truthful and the deceptive subjects. Horvath and Reid, The Reliability of Polygraph Examiner Diagnosis of Truth and Deception, J Crim L C & P S, 276-376 (1971).

The nature of the polygraph examination is closer to a psychiatric evaluation than to objective scientific analysis such as fingerprints and ballistics. The polygraph technique is heavily dependent on the subjective evaluation of the expert both in the administration of the test and in reaching the result.

After evaluating these seven factors, we conclude that under proper conditions polygraph evidence may possess some probative value and may, in some cases, be helpful to the trier of fact. We now, therefore, evaluate the probative value of such evidence against its prejudicial effect.

SHOULD POLYGRAPH EVIDENCE BE EXCLUDED UNDER OEC 403?

In this opinion, as mentioned, we have accepted the invitation of the Legislative Assembly to adopt a "standard

to be used in determining the admissibility of scientific evidence," see Commentary, Oregon Evidence Code 138. In doing so, this court has rejected the Frye standard of "general acceptance in the scientific community" as an unnecessarily rigid concept and has made "general acceptance" one of seven factors to be considered in determining the relevancy of scientific evidence.We also have rejected the Kersting "reasonably reliable" test as too simplistic but retain aspects of it to be considered in an overview of probativeness of scientific evidence. We have set forth seven factors to be used in connection with the definition of "relevancy" as defined in OEC 401 and to be utilized in determining the helpfulness test for expert testimony expressed in OEC 702. Having evaluated these seven factors in connection with OEC 401 and OEC 702,

and finding that polygraph evidence may possess some relevance, we now turn to the issue whether such evidence, if relevant, should be excluded under OEC 403, which emphasizes that although evidence may be probative the inquiry does not stop there. The evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence.

This rule requires trial courts and, in some cases, appellate courts to evaluate the degree to which the trier of fact may be overly impressed or prejudiced by a perhaps misplaced aura of reliability or validity of the evidence, thereby leading the trier of fact to abdicate its role of critical assessment. See 3 Weinstein's,

supra 702-19. The trial judge in the present case noted:

> "I believe the reason why [polygraph evidence is not admissible] is a concern about the misuse by the jury that the evidence [will be] overvalued by the trier of fact."

After careful evaluation of this issue he excluded the evidence, commenting:

> "* * * I believe the existing Oregon Supreme Court decisions require * * * the results of polygraph evidence, which has been offered in evidence and the record has been made, are not admissible and it's because I believe no matter how you phrase it, it's because of the misuse of the evidence, potential misuse of the evidence, overvaluing of [the] accuracy that has been one of the concerns."

Judge Unis's evaluation of the reasons for excluding polygraph evidence has been stated by many courts and many writers. We said as much in State v. Green, supra, 271 Or at 169:

> "* * * [It]t is our opinion

> that the danger of prejudice from the impact of such evidence [polygraph] upon the question of the credibility of a defendant is so great as to ordinarily outweigh the probative value of such evidence * * *."

The Colorado Supreme Court concluded in People v. Anderson, 637 P2d 354, 361 (Colo 1981):

> "The admission of polygraph evidence at trial is also unwarranted because of the serious interference with and potential prejudice to a jury's evaluation of the demeanor and credibility of witnesses and their testimony. * * * [W]e are acutely aware that the polygraph is unlike other scientific evidence since what it attempts to measure -- the truthfulness of a witness or defendant -- is so directly related to the essence of the trial process.
>
> "* * * Apart from the doubts raised about reliability and competence, * * * there is an inherent danger that a jury will rely too heavily on the results of a polygraph test. Because of its aura of scientific infallibility, we believe that jurors are likely to give significant, if not conclusive weight to a polygrapher's opinion * * *. [T]he jurors'

> traditional responsibility to collectively ascertain the facts to determine whether guilt has been proven would be prejudiced by the admission of polygraph evidence."

As was said in United States v. Addison, 498 F2d 741, 744 (DC Cir 1974), the scientific evidence must not "assume a posture of mystic infallibility in the eyes of a jury of law[persons]." This view is shared by many other courts. See, State v. Catanese, 368 So 2d 975 (La 1979); United States v. Alexander, 526 F2d 161 (8th Cir 1975); People v. Barbara, 400 Mich 352, 255 NW2d 171 (1977). n31 A Committee on Polygraphy of the New Jersey Supreme Court concluded that jurors would consider polygraph evidence as being infallible. Garvey, Polygraph (2) 116-21 (1973).

n31 See also State v. McNeil, 46 NC App 533, 265 SE2d 416, 419 (1980) ("We believe

the jury is still the better forum, when presented with the facts, to determine guilt or innocence."); People v. Monigan, 72 Ill App 3d 87, 28 Ill Dec 395, 390 NE2d 562, 563 (1979) ("The admission of the polygraph test has such an impact on the jury that the truth seeking function of the trial will be destroyed."); People v. Davis, 343 Mich 348, 72 NW2d 269 (1955); People v. Sinclair, 21 Mich App 255, 175 NW2d 893 1970); Henderson v. State, 230 P2d 495 (Crim Ct of App Okla 1951).

Many writers have commented on this problem of overvaluation of polygraph evidence by the trier of fact.See, Abbel, Polygraph Evidence: The Case Against Admissibility in Federal Trials, 15 Amer Crim L Rev 29, 53 (1977) ("[T]he use of the polygraph machine lends an illusory aura of objectivity and accuracy which is likely to mislead jurors into giving undue

weight to polygraph examinations'); Highleyman, The Deceptive Certainty of the Lie Detector, 10 Hastings L J 47 (1958); Kaplan, The Lie Detector: An Analysis of its Place in the Law of Evidence, 10 Wayne L Rev 381, 386 (1964); Raddeck, The Admissibility of Polygraph Results in Criminal Trials: A Case for the Status Quo, 3 Loyola U L J (Chic) 289, 300-02 (1972).

Polygraph evidence may well divert the trier of fact from the direct and circumstantial evidence presented in a case to a distorted valuation of the polygraph evidence. Polygraph evidence is not just another form of scientific evidence presented by experts such as ballistics analysis, fingerprint and handwriting comparisons, blood typing and neutron activation analysis. These other tests do not purport to indicate with any

degree of certainty that the witness was or was not credible. By its very nature the polygraph purports to measure truthfulness and deception, the very essence of the jury's role. See, United States v. Alexander, supra, 526 F2d at 169.

n32 For many other examples of scientific evidence, see In winkelried, A New Era in the Evolution of Scientific Evidence--A Primer on Evaluating the Weight of Scientific Evidence, 23 Wm & Mary L Rev 261 (1981).

In addition to the potential misuse and overvaluation of the polygraph evidence, we are also concerned about the undue delay in administering justice that would occur if we were to allow admission of polygraph evidence in all cases.As previously noted, there are currently only 35 licensed polygraphers in this state who

might be available to conduct testing of witnesses for trials in Oregon. In 1983, our circuit courts terminated 83,966 cases our district courts terminated 457,632 cases. Of course, not all these cases would warrant polygraph testing of witnesses. Nevertheless, a substantial number of cases, whether tried or not, would involve the "lie detector" testing of potential witnesses. All this administrative burden could cause "undue delay" as set forth in OEC 403.

Furthermore, as well as disrupting the lives of many witnesses (which in some cases have already been burdened with interrogation by police officers, defense investigators, grand jury proceedings, preliminary hearings, pretrial motion testimony and trial testimony), the introduction of polygraph evidence at trial could result in a time-consuming and

confusing battle of polygraph experts. In Commonwealth v. Fatalo, 346 Mass 266, 191 NE2d 479 (1963), the Supreme Court of Massachusetts upheld the trial court's rejection of all evidence concerning a polygraph test. In referring to an offer of proof by the defendant, which the prosecution opposed, the opinion stated:

> "It is precisely this sort of controversy which creates the danger that on the introduction of such evidence a trial could descend into a battle of experts on the probative value of the polygraph test rather than a determination of the guilt or innocence of a defendant. The end result, in all likelihood, would be confusion instead of enlightement." 191 NE2d at 480-81.

In United States v. Urquidez, 356 F Supp 1363 (DC CD Cal 1973), the federal trial judge wrote:

> "* * * The most obvious conclusion that resulted from the three days of testimony [about polygraph evidence] is that there are many variables,

> other than the ultimate question of truth or falsity, that can influence the results of a polygraph test. There are also many areas in which 'experts' can disagree as to the appropriateness of the way in which the test is given and as to how the results should be interpreted." 356 F Supp at 1365.

He continued:

> "* * * [A]lthough the inquiry was far from complete, the experience of this case has amply shown that, as of now, the validity of a polygraphic test is dependent upon a large number of variable factors, many of which would be very difficult, and perhaps impossible, to assess. In a given case, the time required in order to explore and seek to adjudge such factors would be virtually incalculable (we did little more than make a beginning in the present case). Accordingly, this court is impelled to the conclusion that the administration of justice simply cannot tolerate the burden of litigation inherently involved in such a process." Id. at 1367. (Emphasis added.)

Although not in any sense determinative, these concerns are relevant to the issue

whether evidence of questionable value is outweighed by "consideration of undue delay" as set forth in OEC 403.

Oregon Evidence Code Rule 403 codifies the common-law discretionary power of the trial judge in balancing probative value of evidence against its prejudicial effect. But, this so-called "balancing" rule does not always call for the exercise of discretion by the trial court.Notwithstanding the usual deference to trial court discretion, we as an appellate court retain our role to determine the admissibility of scientific evidence under the Oregon Evidence Code. After carefully evaluating evidence and arguments for and against the introduction of polygraph evidence within the context of OEC 401, 702 and 403, we conclude that the probative value of polygraph evidence is far outweighed by reasons for its

exclusion.

OTHER GROUNDS FOR EXCLUSION OF POLYGRAPH EVIDENCE

We find no rule or provision in our evidence code or any Oregon evidentiary decision by this court allowing for any witness, lay or expert, whether utilizing scientific equipment or not, to pass upon the credibility of a trial witness. Although OEC 608 n33 provides that the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, that evidence may refer only to character for truthfulness or untruthfulness. A polygrapher's opinion based on a polygraph examination that a witness was truthful would not qualify under OEC 608(1)(b) because the polygrapher would not have general personal knowledge about the witness's veracity. OEC 608(1)(b) allows persons

familiar with the reputation of a witness to testify in opinion form as to the witness's general truthfulness or untruthfulness. This new rule allowing opinion testimony as to the general veracity of witnesses departs from the common-law restriction that a witness may only testify in the form of general reputation for veracity traits. It has no application to the admissibility of polygraph evidence.

n33 OEC 608 provides:

> "(1) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but:
>
> (a) The evidence may refer only to character for truthfulness or untruthfulness; and
>
> (b) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> "(2) Specific instances of

> the conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. Further, such specific instances of conduct may not, even if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness."

OEC 608(2) expressly prohibits the admission of evidence of specific instances of conduct of a witness for the purpose of attacking or supporting the credibility of the witness. If, as in this case, a witness has passed a polygraph examination, the polygraph result constitutes a specific instance of conduct of the witness being offered for the purpose of supporting the credibility of the witness.Such extrinsic evidence is inadmissible under OEC 608(2).

OEC 608 complements and supports the long-standing position of this court that

no witness may pass upon the credibility of another witness in respect to specific conduct. In excluding psychiatric testimony as to the truthfulness of witnesses, we said in State v. Walgraeve, 243 Or 328, 333, 412 P2d 238 413 P2d 608 (1966):

> "The use of psychiatric testimony in the manner urged by the defendant would create a class of cases in which opinion evidence would, in fact, determine the credibility of witnesses. Unless the function of the jury is to find the truth, its role is devoid of substance. Often the jury can meet this obligation only by determining the credibility of witnesses. The jury system with all its imperfections, has served society well. It has not been demonstrated that the art of psychiatry has yet developed into a science so exact as to warrant such a basic intrusion into the jury process."

This rule was not changed by our recent decision in State v. Middleton, 294 Or 427, 438, 657 P2d 1215 (1983):

> "* * * We expressly hold that in Oregon a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth. We reject testimony from a witness we recognize some jurisdictions accept it."

We certainly agree with Judge Irving Kaufman's eloquent statement supporting this position in excluding polygraph in United States v. Stromberg, 179 F Supp 278 (SD NY), reversed in part on other grounds 268 F2d 256 (2nd Cir 1959):

> "* * * The most important function served by a jury is in bringing its accumulated experience to bear upon witnesses testifying before it, in order to distinguish truth from falsity. Such a process is of enormous complexity, and involves an almost infinite number of variable factors. It is the basic premise of the jury system that twelve men and women can harmonize those variables and decide, with the aid of examination and cross-examination, the truthfulness of a witness. * * * I am not prepared to rule that the jury system is yet outmoded.I still prefer the collective judgment

> of twelve men and women who have sat through * * * a trial and heard all the evidence on the guilt or innocence of a defendant." 179 F Supp at 280.

Although other traditional evidentiary grounds for exclusion of polygraph evidence may exist in any given case, n34 we find discussion of such issues unnecessary here.

n34 Another basic evidence question as to the admissibility of polygraph evidence arises under OEC 801, that is, the hearsay nature of the responses by the witness to the polygrapher. This issue is not presented in this case. The responses here called only for the witness's knowledge of certain facts and were not offered to prove the truth of the matter contained in the answers.See, Bridges v. State, 19 NW2d 529 (Wis 1945). Whereas, in contrast, State ex rel Gerttula v. Hunnicutt, Or , P2d (1984)

(decided this date), presents a serious hearsay problem concerning the out-of-court responses to the polygrapher's questions. The statements in Gerttula were offered to prove the truth of the out-of-court statements by the accused.

CONCLUSION

After analyzing the admissibility of polygraph evidence under the Oregon Evidence Code and existing caselaw, we conclude that upon proper objection polygraph evidence n35 shall not be admissible in any civil or criminal trial in this state n36 or any other legal proceeding subject to the rules of evidence under our Oregon Evidence Code. n37

n35 We refer to unstipulated polygraph evidence. The defendant contends that if polygraph evidence is not generally admissible, it should not be admissible

even by stipulation. The Oregon Court of Appeals in State v. Bennett, 17 Or App 197, 521 P2d 31 (1974), upheld the admissibility of polygraph evidence pursuant to a stipulation. This court has not heretofore passed on that question.

The leading case on stipulations for the admission of polygraph evidence is State v. Valdez, 91 Ariz 274, 371 P2d 894 (1962). Admission by stipulation is now permitted in many federal and state jurisdictions. See, e.g., United States v.Oliver, 525 F2d 731 (8th Cir 1975), cert den 424 US 973 (1976); Corbett v. State, 584 P2d 704 (Nev 1978); Robinson v. Wilson, 44 Cal App 3d 92, 118 Cal Rptr 569 (1974); State v. Lassley, 218 Kan 758, 545 P2d 383 (1976); State v. Ghan, 558 SW2d 304 (Mo App 1977); State v. Towns, 35 Ohio App 2d 237, 301 NE2d 700 (1978); State v. Ross, 7 Wash App 62, 497 P2d 1343 (1972);

Cullin v. State, 565 P2d 445 (Wyo 1977); State v. McDavitt, 62 NJ 36, 297 A2d 849, 855 (1972). See also Note, The Polygraphic Technique: A Selective Analysis, 20 Drake L Rev 330, 340 (19); Note, The Admissibility of Polygraph Evidence Pursuant to Stipulation in Criminal Proceedings, 5 Akron L Rev 235 (1972).

Other states have continued to exclude polygraph evidence even upon stipulation. See, e.g., Pulakis v. State, 476 Pid 474 (Alaska 1970); State v. Corbin, 285 So 2d 234 (La 1973); People v. Liddell, 63 Mich App 491, 234 NW2d 669 (1975); Fulton v. State, 541 P2d 871 (Okl Cr 1975); Lewis v. State, 500 SW2d 167 (Tex Cr App 1973); Romero v. State, 493 SW2d 206, 211 (Tex Crim App 1973); Commonwealth v. Pfender, 280 Pa Super 417, 421 A2d 791 (1980); State v. Dean, 103 Wis 2d 228, 307 NW2d 628 (1981).

n36 The court has recently excluded reference to polygraph evidence offered to rehabilitate witnesses in criminal cases. State v. Foster, 296 Or 174, 674 P2d 587 (1983); State v. Snider, 296 Or 168, 674 P2d 585 (1983); State v. Eby, 296 Or 63, 673 P2d 522 (1983); State v. Middleton, 295 Or 485, 668 P2d 371 (1983).

n37 OEC 101, Applicability of Oregon Evidence Code, provides:

> "(1) Courts. The Oregon Evidence Code applies to all courts in this state except for:
> (a) The small claims division of the Oregon Tax Court as provided by ORS 305.545;
> (b) The small claims division of a district court as provided by ORS 46.415; and
> (c) The small claims department of a justice's court as provided by ORS 55.080.
> "(2) Proceedings generally. The Oregon Evidence Code applies generally to civil actions, suits and proceedings, criminal actions and proceedings and to contempt proceedings except those in which the court may act summarily.

"(3) Rules of privilege. Rules 503 to 514 relating to privileges apply at all stages of all actions, suits and proceedings.

"(4) Rules inapplicable. Rules 100 to 412 and Rules 601 to 1008 do not apply in the following situations:

(a) The Determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(b) Proceedings before grand juries, except as required by ORS 132.320.

(c) Proceedings for extradition, except as required by ORS 133.743 to 133.857.

(d) Sentencing, except as required by ORS 137.090.

(e) Proceedings to revoke probation, except as required by ORS 137.090.

(f) Issuance of warrants of arrest, bench warrants or search warrants.

(g) Proceedings under ORS chapter 135 relating to conditional release, security release, release on personal recognizance, or preliminary hearings, subject to ORS 135.173.

(h) Proceedings to determine proper disposition of a child in accordance with ORS 419.500(2).

(i) Proceedings under ORS 484.445 to 484.480 to determine whether a driving while under

the influence of intoxicants diversion agreement should be allowed or terminated."

The Court of Appeals is affirmed.

STATE OF OREGON ex rel STEVEN D. GERTTULA, District Attorney for Clatsop County, Plaintiff-Relator, v. JOHN F. HUNNICUTT, Judge of the Circuit Court of the State of Oregon for the Nineteenth Judicial District, Defendant.

Nos. 83-262; 83-263/SC 29928

Supreme Court of Oregon, In Banc

297 Ore. 448; 687 P.2d 777

July 10, 1984, Filed; Argued and submitted April 4, 1984

Original proceeding in mandamus. Peremptory writ issued.

JONES, J. wrote the opinion.

Wayne Mackeson, Portland, argued the cause for defendant. With him on the briefs was Des Connall, Portland.

Stephen F. Peifer, Assistant Attorney General, Salem, argued the cause for plaintiff-relator. With him on the brief were Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Thomas H. Denney, Assistant Attorney General, Salem.

JONES

JONES, J.

This case comes before the court on an alternative writ of mandamus to review an

order by the Honorable John F. Hunnicutt which allowed the introduction of polygraph evidence in a criminal trial.

Harry Sherman Flavel was charged by the State of Oregon in the Clatsop County Circuit Court with assault in the first degree and attempted murder.The charges stem from Flavel stabbing and seriously injuring Alec Josephson.

Prior to trial, Flavel underwent an "ex parte" polygraph examination conducted by Dr. Stanley Abrams at defense counsel's request. These tests were conducted by Dr. Abrams utilizing the following control questions on the issue of self defense:

1. Did Josephson threaten to kill you several times (before the stabbing)?

2. Did Josephson throw you against the wall a number of times?

3. When you used the knife on Josephson, at that time did you believe

that he might kill you?

Dr. Abrams concluded that Flavel was being truthful as to the first and third questions, but that Flavel's response was inconclusive in reference to Josephson throwing Flavel against the wall.

This evidence was offered during an omnibus hearing conducted by the defendant, a circuit judge serving in Clatsop County. After the omnibus hearing, the defendant-judge issued the following letter opinion and order:

> "This matter came on for hearing on the 1st day of July, 1983, upon defendant's [Flavel's] Motion for Admission of Expert Testimony Regarding Defendant's Polygraph Examination, the defendant appearing personally and by counsel, Des Connall, and the State appearing by Don H. Haller, III, Deputy District Attorney for Clatsop County, Oregon. The court, having heard the testimony of Stanley Abrams, a clinical psychologist who administered a polygraph examination to the defendant in

the above-entitled case, and having read defendant's memorandum in support of Motion for Admission of Expert Testimony Regarding Defendant's Polygraph Examination, and being fully informed in all of the premises contained therein, makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

"1. Dr. Stanley Abrams is licensed and qualified to administer polygraph examinations, and by his knowledge, skill, experience, training and education, is qualified as an expert and may therefore testify thereto in the form of an opinion;

"2. Dr. Stanley Abrams' testimony will appreciably help and assist the trier of fact in understanding the evidence and factual issues in the above-entitled case; and

"3. Based upon the record in this particular case, there is credible evidence demonstrating that the polygraph examination administered by Dr. Stanley Abrams is reasonably reliable.

"THEREFORE, IT IS HEREBY ORDERED that defendant's Motion in this matter is allowed under the following conditions:

"1. That defendant provide the State with copies of the polygraph examination administered by Dr. Abrams along with its results;

"2. That defendant submit

> himself to examination by a qualified polygrapher of the State's choosing; and
>
> "3. That defendant answer all relevant questions concerning the issues before this court without claim of fifth amendment exemption."

Based upon our decision in State v. Brown, Or , P2d (1984) (decided this date), the trial judge had no discretion to issue the order because polygraph evidence is inadmissible. The defendant-judge is ordered to rescind the above omnibus hearing order entered August 2, 1983.

Peremptory writ issued.

UNITED STATES CONSTITUTION

AMENDMENT V

When prosecution to be by presentment or indictment; double jeopardy; self-incrimination; due process; compensation for property taken for public use. No personal shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION

AMENDMENT VI

Rights of accused in criminal prosecutions. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that pursuant to Rule 28.3 of the Rules of the Supreme Court, I have made service of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Oregon on counsel of record for Respondent by depositing in the United States Post Office in Portland, Oregon, postage prepaid, on February 16, 1988, three certified true copies thereof addressed as follows:

Dave Frohnmayer
Attorney General
Johnathan Fussner
Assistant Attorney General
Department of Justice
Appellate Division
400 Justice Building
Salem, OR 97310

/s/ MARC D. BLACKMAN

MARC D. BLACKMAN
Counsel for Petitioner

Supreme Court, U.S.
FILED
JUN 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1505

In the Supreme Court of the United States

OCTOBER TERM, 1987

HARRY SHERMAN FLAVEL,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On a Petition for a Writ of Certiorari
to the Supreme Court of Oregon

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Due Process Clause entitle a criminal defendant to a new trial when, after trial, the parties learn that a witness was hypnotized as a means of therapy to cope with pain and trauma, but not to enhance the witness's memory of what occurred?

2. Does Oregon's evidentiary prohibition on admitting polygraph results in criminal cases violate a defendant's constitutional right to present a defense as secured by the Due Process or Confrontation and Compulsory Process Clauses?

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STATEMENT OF THE CASE

Statement of Facts.

Respondent accepts petitioner's statement of facts only as supplemented by additional facts discussed in the argument below.

REASONS TO DENY THE WRIT

I. This case does not present the question on the admissibility of the post-hypnotic testimony that petitioner seeks to have resolved.

Petitioner argues that the Court should grant review to resolve lower court conflicts on the admissibility of hypnotically influenced testimony in criminal cases. Petitioner points to three different approaches lower courts take in deciding whether to admit testimony of a witness who has been hypnotized in an effort to restore or enhance his or her memory. Additionally, petitioner relies on expert testimony in this record and observations of courts and commentators about the unreliability of hypnotically refreshed testimony. His federal constitutional claim is that he has a Confrontation Clause right to cross-examine effectively the witnesses against him, a right that is impaired or defeated by possible "suggestion," "confabulation" and "memory hardening" caused by memory-enhancement hypnosis. He also argues that post-hypnotic testimony is so inherently unreliable as to violate the Due Process Clause.

A. The facts of this case do not involve hypnosis of the kind that has divided lower courts.

The state agrees that lower appellate courts are significantly divided on the admissibility of a witness's testimony after the witness has been hypnotized for purposes of enhancing memory on the subject matter of the testimony. This case, however, does not factually present that question.

Petitioner's challenge to the victim's testimony arose after trial when the prosecutor attempted to assess the victim's

damages for purposes of requesting restitution at sentencing. The prosecutor discovered that the victim had gone to a counselor who hypnotized the victim as a means of therapy to cope with insomnia, pain and other consequences of his stab wound. When defense counsel learned of the therapy through the restitution request, he moved for a new trial.

At the hearing on the motion, the victim testified that he recalled what was said during the hypnosis sessions, and that he did not discuss the particular facts of the stabbing incident. (Tr. 1861-64). Although the counselor had no specific memory of what he said during the sessions, he believed that the stabbing probably had been discussed in some fashion. However, he was very sure he did not question the victim about the circumstances of the stabbing incident itself or discuss the incident in detail. (Tr. 1804, 1810-11, 1815, 1819-21, 1827-28, 1834-35). The victim and the counselor both agreed that the hypnosis had been directed at the victim's problems of insomnia, physical pain, and anxiety. (Tr. 1810, 1862-64). Contrary to the implication at pages 8 and 24 of the petition, the victim's "feelings of guilt" for which he was counseled did not relate to his actions during the stabbing incident, but rather to the fact that his physical injuries prevented him from working and supporting his family, and from entering the Army as he had intended to do. (Tr. 1834-35, 1842-48).

Petitioner called a hypnosis expert, Dr. Abrams. He testified that when hypnosis probes a person's memory of specific events, the hypnosis process can alter a subject's recollection and change his or her confidence level in the memory. (Tr. 1870-76). He conceded, however, that if the hypnotherapy in this case was limited to dealing with the mental and physical effects of the stabbing and did not concentrate on the victim's memory of the incident itself, it would not render the victim's testimony unreliable. (Tr. 1894). Because the hypnotherapy sessions were not recorded, petitioner's expert could not

express an opinion on whether they affected the victim's testimony. (Tr. 1877-78).

The trial court affirmatively found that neither the prosecution nor the defense was previously aware that the victim had been hypnotized. The trial court also found that there was "some" discussion of the stabbing incident in the course of the therapy and that neither the victim nor the counselor could recall the exact amount or depth of that discussion. However, the court determined that the hypnosis was a means of treatment for overcoming the physical and psychological impact of the victim's injury. After concluding that petitioner was afforded a fair trial, the court denied the motion for a new trial. (Order, Pet. Cert. App-1 - App-7).

As the facts reveal, this simply is not a case involving hypnotically refreshed testimony. The victim did not suffer any memory loss and the hypnosis was not designed to restore or refresh what the victim remembered about the crime. Instead, this hypnosis was a form of personal counseling. Like other forms of counseling that victims commonly seek (*e.g.*, therapeutic discussion with mental health professionals, clergy, victims' support groups, family and friends), it was designed to help the victim handle the emotional trauma and physical pain of his injuries and disability. Even petitioner's expert agreed that hypnosis for this purpose, if it does not dwell on the victim's recollection of the circumstances of the crime, does not present the risks that arguably attend to hypnosis designed to enhance memory. This case thus presents a relatively rare set of facts, one that falls outside the rationale of the decisions petitioner cites and that has not created a difficult evidentiary question for lower courts.[1] Review would not provide an opportunity to resolve

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[1] We can conceive of analogous contexts in which this issue might arise. For example, a rape victim who suffers sexual dysfunction as a conse-

(Footnote continued on next page)

the split of authority on the admissibility of hypnotically refreshed testimony.

B. This case is in the wrong procedural posture to resolve the narrow issue of the admissibility of post-hypnotic testimony.

The petition glosses over a second impediment to resolution of the hypnosis issue it attempts to present. As the facts unequivocally establish, neither the prosecutor nor the defense attorney knew at the time of trial that the victim had been hypnotized for any purpose. In effect, the prior hypnotherapy was in the nature of newly discovered evidence that petitioner argued should result in a new trial. Thus, this case does not directly present the question of whether and under what circumstances post-hypnotic testimony is constitutionally admissible in a criminal case. Rather, the issue is a significant step removed: whether a criminal trial constitutionally must be reopened when the parties discover post-trial that a witness previously was hypnotized.

Petitioner assumes that the constitutional answer is the same no matter whether the testimony was admitted over objection at trial or whether the fact of hypnosis was discovered later. It is not. The mere existence of newly discovered evidence bearing on a convicted defendant's guilt or innocence is not, in and of itself, a constitutional basis to set aside the criminal judgment. *Townsend v. Sain*, 372 U.S. 293, 317 (1963). The focus is on fundamental fairness in the trial process or interference with some other protected right. For

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(Footnote continued from previous page)

quence of the rape might undergo hypnosis as therapy for the dysfunction. Similarly, an ex-smoker or former alcoholic who is so shaken by a robbery or other crime that he or she resumes drinking or smoking might seek hypnotherapy to quit again. This type of hypnosis does not appear to have created questions about the reliability of a victim's testimony about the circumstances of the crime or to otherwise have created problems for lower courts.

example, a constitutional issue arises when conviction or punishment depends on a prior uncounseled conviction, thus infringing the defendant's sixth amendment interests. *E.g.*, *Loper v. Beto*, 405 U.S. 473 (1972) (impeachment use of uncounseled convictions); *Burgett v. Texas*, 389 U.S. 109 (1967) (increased punishment due to prior uncounseled convictions). Similarly, due process principles of rudimentary fair play and justice may be offended by a conviction based on perjury, but only when the prosecution has deliberately placed perjured testimony into evidence or failed to correct testimony known to be untrue. *See Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959). Here, there is no direct interference with weighty sixth amendment interests or a violation of fundamental fairness by a prosecutor's knowing use of false testimony or fabricated evidence. The subsequently discovered basis to possibly discredit the victim's testimony therefore is not *per se* of constitutional dimension. Instead, to be constitutionally entitled to a new trial, a defendant must meet what this Court has described as the "severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *United States v. Agurs*, 427 U.S. 97, 111 and n. 19 (1976).

This case therefore has more to do with motions for new trial based on newly discovered evidence—an issue the petition does not address—than it does with the admissibility of post-hypnotic testimony. Petitioner's factual showing at the hearing on the motion for new trial fell far short of demonstrating a basis even to impeach the victim's memory; but at the very least, the trial judge was entitled to find that attacking the victim's credibility on so slender a reed (hypnosis for purposes other than memory-enhancement) would not satisfy petitioner's burden to show he probably would have been acquitted if he had known of the hypnosis at trial. Even so, this case at most represents an occasion to apply settled legal

principles to disputed facts. There is no significant constitutional rule to be clarified or lower court disharmony to be resolved.

II. The question of the admissibility of unstipulated polygraph evidence has not troubled lower courts and does not present a significant question meriting this Court's resolution.

Petitioner argues that the Oregon court's refusal to admit evidence that he had "passed" a polygraph examination violated the Compulsory Process and Due Process Clauses. He claims that the polygraph's reliability has achieved sufficient scientific acceptance that states may not, consistent with the constitution, adopt evidentiary rules that exclude polygraph evidence on a *per se* basis. The state agrees that the issue of the admissibility of polygraph evidence, over one party's objection, is squarely presented in this case. However, we do not agree that it merits certiorari review.

Lower appellate courts, both state and federal, have had little difficulty with this question. The available authority is all but unanimous in holding that polygraph results, absent a stipulation, may not be introduced. *See State v. Brown*, 297 Or. 404, 687 P.2d 751, 771 (1984) and cases cited therein.[2] *See generally* Annot., 92 A.L.R.3d 1317, 1318 (1979 & Supp. 1987); Annot., 53 A.L.R.3d 1005, 1007 (1973 & Supp. 1987); Annot., 43 A.L.R. Fed. 68, 72, 78-83 (1979 & Supp. 1987). The Oregon Supreme Court's rationale for adopting a rule of nonadmissibility typifies the concerns other courts have expressed about polygraph results: scientific disagreement over the test's reliability; test integrity that is highly dependent on the

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[2] Although the Oregon Supreme Court in *Brown* concluded that the lower courts were not fully in accord, the decisions it cites as admitting unstipulated polygraph results have involved peculiar facts and circumstances. We do not read them as general authority for admitting polygraph results over a party's objection.

manner in which the test is administered, the examiner's qualifications and the examiner's subjective interpretation of the results; and a tendency for juries to overvalue polygraph evidence. *See generally State v. Brown*, 687 P.2d at 760-72.

Petitioner nevertheless argues that polygraph results are sufficiently reliable that the constitution compels their admission in a criminal case when they tend to exonerate the accused. The petition does not cite a single case so holding, nor has the state found one. Given the almost uniform suspicion with which courts view unstipulated polygraph results,[3] the dearth of authority for petitioner's position is not surprising.

Petitioner therefore attempts to reason by analogy to this Court's holdings in *Chambers v. Mississippi*, 410 U.S. 284 (1973) and *Rock v. Arkansas*, 107 S.Ct. 2704 (1987), arguing that his right to present his defense is so fundamentally impaired that this Court should determine the admissibility of polygraph results as a matter of constitutional law. However, a comparison of this case with *Chambers* and *Rock* reveals that a *per se* rule of nonadmissibility of polygraph results does not present the constitutional concerns on which those cases turned.

In *Chambers* the defense called someone to the stand who had possibly committed the crime with which the defendant was charged. In order to expose the witness's "damning repudiation" of his story of innocence and his alibi, the

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[3] As the Oregon Supreme Court suggested in *State v. Brown*, 687 P.2d at 776 and n. 35, stipulated polygraph results, which are not involved here, present a wholly different question. Lower courts are sharply divided on their admissibility, some on the theory that the stipulation serves to permit the parties to control the variables deemed significant to the test's fairness and reliability. *E.g.*, *Corbett v. State*, 94 Nev. 643, 584 P.2d 704 (1978). Many courts simply view the stipulation as a waiver of either party's objection. *See State v. Brown*, *supra*, discussing cases.

defense asked to cross-examine him as an adverse witness. The trial court refused the request under a state evidentiary rule that a party who calls a witness "vouches" for his credibility and may not impeach him. The trial court also refused, on hearsay grounds, to admit other evidence that the same individual had confessed to the crime. This Court found that the defendant's right to confront the witnesses against him was fatally undermined by both evidentiary rulings. The Court reasoned that the voucher rule's largely anachronistic rationale no longer served the trial's truth-seeking function and operated to interfere directly with the defendant's ability to defend against the state's charges. *Chambers v. Mississippi*, 410 U.S. at 296-98. Similarly, the hearsay testimony bore assurances of reliability and the reasons for excluding the hearsay did not justify precluding the defendant from presenting witnesses in his defense. *Id.*, 410 U.S. at 302.

In *Rock* the accused was barred from testifying in her murder trial about the details of the shooting because she had previously been through memory-enhancement hypnosis. The trial court ruled the testimony inadmissible under the state's *per se* evidentiary prohibition on hypnosis-refreshed testimony. As this Court observed, the accused was virtually prevented from describing any of the events on the day of the shooting and was not able to describe in her own words the shooting itself. *Rock v. Arkansas*, 107 S.Ct. at 2712. Because the defendant's right to testify on her own behalf was directly infringed and because the state's evidence rule operated across the board, rather than applying only when the hypnosis rendered the testimony unreliable, this Court reversed the conviction. *Id.*, 107 S.Ct. at 2714-15.

Although petitioner attempts to argue that the exclusion of polygraph results is like the exclusion of a defendant's own testimony (*Rock*) or limitations on examining witnesses who have knowledge about the crime (*Chambers*), it is not. The

polygraph examination essentially strives to perform the same function as the jury in a criminal trial, that is, it attempts to determine who is telling the truth. Polygraph evidence is not direct evidence of facts, but instead assesses the credibility of someone who professes knowledge of the facts. In a very real way, it is akin to a witness who claims that when defendant told him what happened, the witness believed defendant was being truthful. It is also similar to the "primitive English trial practice" in which oath-takers or compurgators were called to stand behind a particular party's position in any controversy. *See Chambers v. Mississippi*, 410 U.S. at 296 (discussing the English practice). Thus, as the Oregon Supreme Court has observed, polygraph tests are truly unique and novel for they are the only scientific instrument that attempts to convey to a jury whether a witness has been deceptive or truthful. *State v. Brown*, 687 P.2d at 771. Rather than furthering a defendant's right to take the stand or to present witnesses in his own behalf, polygraph evidence tends toward a head-on conflict with our notions of the function the jury properly should perform. *See, e.g., State v. Lyon*, 304 Or. 221, 744 P.2d 231 (1987) (adopting rule excluding stipulated polygraph evidence in part on the theory that it invades the jury's province).

Thus, the constitutional interests on which petitioner relies simply are not at stake here. Short of invalidating rules that directly prevent a defendant from testifying or from presenting witnesses with knowledge of relevant facts, this Court has deferred to the states in their attempts to create and enforce evidentiary rules by which the defense and the prosecution alike must abide. *See, e.g., Marshall v. Lonberger*, 459 U.S. 422, 438 n. 6 (1983) (the Due Process Clause does not permit the federal courts to engage in finely tuned review of the wisdom of state evidentiary rules). Given the open questions about the reliability of polygraph evidence and the fact that its nonadmission does not directly infringe a defendant's

right to present a defense, evidentiary rules governing polygraph results should not be constitutionalized. The Oregon court's resolution of this issue as a matter of state evidence law comports with this Court's jurisprudence and does not merit certiorari review.

CONCLUSION

For the reasons set forth above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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